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No. _____

In the Supreme Court of the United States

NORTH COUNTY COMMUNICATIONS CORP.,
Petitioner,

v.

CELLCO PARTNERSHIP,
D/B/A VERIZON WIRELESS-CA (OCN 6006), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 20, 2010

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QUESTIONS PRESENTED

1. Does a wireless phone carrier's refusal to pay for its use of a Competitive Local Exchange Carrier's network or negotiate a reciprocal compensation arrangement give rise to a private right of action in Federal court by the CLEC, where the FCC reasonably could conclude that either act constitutes an unjust or unreasonable practice under 47 U.S.C. § 201(b)?

2. If a CLEC is obligated by the 1996 Telecommunications Act and FCC regulations to allow such free use of its system, has a taking occurred for which it is entitled to just compensation under the Fifth Amendment to the Constitution?

PARTIES TO THE PROCEEDING

Petitioner is North County Communications Corp., plaintiff-appellant in the Ninth Circuit. Respondents in this Court, defendants-appellees below, are Cellco Partnership, d/b/a Verizon Wireless-CA (OCN 6006); CellCo Partnership, d/b/a/ Verizon Wireless-NM (OCN 6573); T-Mobile USA, Inc. (OCN 6529); Cal-One Cellular LP, (OCN 6604); Phoneco, L.P.-CA, (OCN 542B); Cingular Wireless; and Cricket Communications, Inc.

Numerous other defendants were named in the complaint, but did not participate in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

North County Communications Corp. has never issued any stock. No parent or publicly held corporation owns 10 percent or more of North County Communications Corp.

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OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion (App. A, *infra*, 1a-29a) is reported at 594 F.3d 1149. The November 2007 opinion of the district court, which incorporated the order granting the motions to dismiss with prejudice (App. B, *infra*, 30a-51a) is unreported, as is the district court's February 2007 order granting the motions to dismiss with leave to amend (App. C, *infra*, 52a-70a).

JURISDICTION

The Ninth Circuit issued its opinion on February 10, 2010, and denied a timely petition for rehearing *en banc* on March 24, 2010. (App. D, *infra*, 71a-72a). On June 3, 2010, Justice Kennedy extended the time for filing this petition for a writ of certiorari to and including August 20, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Because this petition draws into question the constitutionality of the Telecommunications Act of 1996, 110 Stat. 56, codified in various sections throughout Title 47 of the U.S. Code, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the Communications Act of 1934, Title 47 of the United States Code, as amended by the Telecommunications Act of 1996, 110 Stat. 56 (codified at 47 U.S.C. §§ 201(b), 206, 207, 251(a)(1), and 251(b)(5)); of 47 C.F.R. § 20.11; and of the Fifth Amendment to the Constitution, are reproduced at App. E, *infra*, 73a-76a.

STATEMENT OF THE CASE

This case raises important questions relating to the remedies provided under the Communications Act of 1934 (as amended by the Telecommunications Act of 1996), and the proper test for determining when a private right of action exists in Federal court where a wireless phone carrier has taken full advantage of the interconnectivity obligations the Act imposes on others, yet flouted its own statutory duty to pay compensation. At bottom this is a case about free-riding, and what, if anything, Congress intended to let its victims do about it.

Petitioner North County Communications Corp. ("North County") offers telephone service to its customers in California, including telephone lines to internet service providers (ISPs), voice-mail companies, and chat-line providers, among others.

Respondents are a group of wireless carriers who offer calling plans into areas that North County services. Although North County routes (terminates) calls from Respondents' customers to its own end users, for which it incurs substantial costs, Respondents refuse to negotiate compensation agreements with North County and have ignored the bills North County has sent them. North County sued, alleging that the carriers' conduct constituted an unjust or unreasonable practice under 47 U.S.C. § 201(b) and also violated § 251, but the district court held that it lacked jurisdiction to hear the case, and the Ninth Circuit affirmed.

1. Prior to 1996, local telephone service was provided through a regime under which States typically granted an exclusive franchise to a given local exchange carrier (LEC) in a particular area, thereby creating a system of local monopolies. In passing the Telecommunications Act of 1996, which amended the Communications Act of 1934 (the Act), Congress sought to end these local monopolies and develop a national telecommunications policy that strongly favored local telephone-market competition. To that end, the Act imposes on all telecommunications carriers a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). It also requires that all LECs enter into agreements for compensating each other for the exchange and termination of telecommunications traffic. 47 U.S.C. § 251(b)(5).

The Act assigns liability to a common carrier for injuries caused by "any act...in this chapter... declared to be unlawful" or by "omit[ting] to do any act, matter,

or thing in this Act required to be done." 47 U.S.C. § 206. Section 201(b) declares unlawful any "practice" that is "unjust" or "unreasonable," and § 207 expressly grants a private right of action in Federal district court to recover damages for such injuries. In *Global Crossing Telecomm., Inc. v. Metrophones Telecomm. Inc.*, 550 U.S. 45 (2007), this Court held that a private right of action exists under § 207 if the Federal Communications Commission (FCC) could properly find that a failure to pay compensation is an "unjust" or "unreasonable" practice under § 201(b).

2. North County is a Competitive Local Exchange Carrier (CLEC) under 47 U.S.C. § 153(26). It provides switched local exchange, exchange access and other telecommunications services to end users in California. Respondents are Commercial Mobile Radio Service (CMRS) providers as defined in § 153(27) and § 332(d)(1) of the Act, and offer their customers calling plans into areas North County serves. Consistent with its duties under § 251(a)(1) and 47 C.F.R. § 20.11(a), North County terminates calls from Respondents' customers to its end users, for which it incurs significant associated costs. (App. 32a-33a).

The FCC, acting under 47 U.S.C. §§ 332 and 201(a), implemented regulations requiring CMRS providers to pay LECs for the latters' transport and termination of calls that originate on the facilities of the CMRS providers. 47 C.F.R. § 20.11(b), 59 Fed. Reg. 18,493 (Apr. 19, 1994) (LECs and CMRS providers "shall comply with principles of mutual compensation") (App., 75a); *see also In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination*

Tariffs, Declaratory Ruling and Report and Order, 20 F.C.C.R. 4856, ¶ 2 & n.8 (2005) (*T-Mobile Declaratory Ruling*). The regulation further states that a CMRS provider "shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the [CMRS provider]." 47 C.F.R. § 20.11(b)(2) (App., 75a).

Early in the last decade, compensation disputes arose between LECs and CMRS providers, and some of the former sought relief by filing wireless termination tariffs with state public-utility commissions, seeking payment for terminating traffic that originated with a CMRS provider with whom they had no reciprocal agreement. In 2002, a group of several CMRS providers, including Respondent T-Mobile USA, Inc., petitioned the FCC for a ruling that such tariffs were not a proper mechanism for establishing reciprocal compensation arrangements, and that an incumbent LEC (ILEC) engages in bad faith when it unilaterally files one without first negotiating in good faith with CMRS providers. *T-Mobile Declaratory Ruling*, at 4855, ¶ 1 & n.1. For their part, the LECs noted that, absent a negotiated agreement or other arrangement, wireless termination tariffs were the only means by which they could be compensated, since they had no meaningful opportunity either to bargain with CMRS providers or refuse the incoming traffic, *Id.* at 4859-60, ¶ 8.

The FCC rejected the CMRS providers' request to declare such tariffs unlawful, but amended § 20.11 to prohibit LECs prospectively from imposing compensation obligations unilaterally via tariff, and to express the Commission's preference for contractual arrangements. *Id.* at 4860, ¶ 9 & 4862-63, ¶¶ 12-13.

Accordingly, such tariffs were deemed valid and proper prior to their elimination upon the April 29, 2005 amendment of the regulation. *Id.* at 4863, ¶ 13 & n.56; *see also* App. A, *infra*, 8a-9a.

3. Since 2003, North County has sent monthly invoices to Respondents for its termination of traffic originating from their facilities, based on its tariff filed with the California Public Utilities Commission. Respondents, though, refuse to pay the invoices or to negotiate to reach individual compensation arrangements. (App. 33a). CMRS providers have refused payment even though North County's historically billed rates are even lower than those of some ILECs whose bills the CMRS providers do pay. Ninth Circuit Joint Supplemental Excerpts of Record 158, *citing* Declaration of Todd Lesser, ¶ 38, Tab G to complaint in *North County Communications Corp. v. MetroPCS California, LLC*, FCC No. EB-06-MD-007. To date, North County continues to terminate traffic that originates on Respondents' facilities without any compensation from Respondents – some of the largest wireless carriers in the Nation.

North County in 2006 filed a complaint in the United States District Court for the Southern District of California and Respondents moved for summary judgment based on lack of subject-matter jurisdiction; the district court dismissed the complaint but gave North County an opportunity to amend. (App. 52a-70a).

North County ultimately filed a third amended complaint; Count 1 sought a declaration that Respondents' conduct was an "unjust or unreasonable practice" under 47 U.S.C. § 201 and § 202, for which it

had a private right of action in Federal court under § 207, and that Respondents also were violating §§ 206 and 251. Count II sought *quantum meruit* recovery and Count III sought the amounts owed under North County's tariff during the three years prior to the effective date of the *T-Mobile Declaratory Ruling*; subject-matter jurisdiction was grounded in 28 U.S.C. §§ 1331 and 1367(a). In late 2007 a successor district judge, ruling solely on the briefs and in large part based on the first summary-judgment decision, granted Respondents' renewed motion and dismissed the complaint with prejudice. (App. 30a-51a).

North County appealed, but the Ninth Circuit rejected its argument that a carrier's failure to pay for termination services gives rise to a private right of action under 47 U.S.C. § 207. Reading this Court's decision in *Global Crossing* to require a predicate determination by the FCC that the CMRS providers' failure to pay compensation was an unreasonable practice under § 201(b), the Ninth Circuit held that North County had no private right of action because there had been no such FCC determination, and affirmed dismissal of Count I. (App. 23a). The court affirmed dismissal of the claims for *quantum meruit* and the 2002-05 tariff amounts because in its view they arose under State law, *Id.* 27a, ignoring that North County had pleaded federal-question jurisdiction for all its claims. TAC, ¶ 26. The Ninth Circuit held, however, that the dismissal of all claims should be without prejudice, since the FCC still was considering North County's claim for compensation against Metro PCS, another CMRS provider, and had not yet made a determination whether the providers'

failure to compensate North County violated § 201(b). (App. 28a).[1]

North County timely petitioned the Ninth Circuit for rehearing *en banc*, but the request was denied. (App. 71a-72a).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's ruling raises an important question regarding the scope of *Global Crossing Telecomm., Inc. v. Metrophones Telecomm. Inc.*, 550 U.S. 45 (2007) and the test for determining when a private right of action in Federal court exists under § 207, based on a carrier's refusal to pay compensation for termination of calls.

Under the Ninth Circuit's application of *Global Crossing*, the FCC must have previously found that a specific CMRS provider's failure to pay a specific LEC for its termination of calls violates § 201(b) to support a private right of action under § 207. This runs counter to the Court's language in *Global Crossing* making plain that the inquiry is whether the FCC *could* properly hold that a failure or refusal to pay compensation is an "unjust or unreasonable" practice under 47 U.S.C. § 201(b) – not that it actually has done so. Further, the Ninth Circuit's ruling completely overlooks that, with regard to North County's claim

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[1] The FCC on November 19, 2009 issued its Order on Review, granting in part and denying in part North County's application for review and denying that of MetroPCS. MetroPCS's appeal of that ruling is awaiting oral argument before the D.C. Circuit on October 14, 2010. *MetroPCS California, LLC v. FCC*, D.C. Cir. No. 10-1003.

under its tariff for 2002-05, the FCC *has* made such a determination. In its *T-Mobile Declaratory Ruling* it held that such tariffs were valid, meaning that Respondents' failure to pay is in violation of 47 C.F.R. § 20.11. And as *Global Crossing* teaches, "to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute." 550 U.S. at 54 (citation omitted) (emphasis in original).

If not reviewed, the Ninth Circuit's ruling will undermine *Global Crossing* and its recognition of the carefully crafted balance that Congress struck in 1996 between the regulatory systems of the 19th and 21st centuries as they apply to the telecommunications sector – as well as the balance between regulation in general and the competition-based regime that is the focal point of current Federal telecommunications law. By requiring CLECs to obtain a predicate FCC determination that Respondents' failure or refusal to pay compensation and/or negotiate is "unjust" or "unreasonable" under § 201(b), where the FCC already has determined that Respondents are under a duty to do both, the Ninth Circuit's ruling condemns North County and hundreds of other CLECs to long-term servitude at the hands of large, well-entrenched national CMRS providers, during the extended period in which they seek redundant administrative relief from the "old regulatory bottles" of a bygone era. 550 U.S. at 57. Certiorari is warranted.

The predicate-determination requirement also is inconsistent with the FCC's own practices and policies, such as its refusal to hear "collection actions." *Contel of the South, Inc. v. Operator Communications, Inc.*, 23 F.C.C.R. 548 (2008). With its decision, the Ninth Circuit has caused widespread uncertainty throughout

the telecommunications industry on a matter of exceptional scope and significance. Review would allow this Court to resolve that uncertainty.

Relatedly, the ruling below also presents the issue of whether requiring CLECs to make their communications networks available to wireless phone carriers, who in turn refuse to provide compensation, constitutes a "taking" for which just compensation is owed. Though the issue is newly raised, it is of sufficient import to warrant this Court's review.

A. The Ninth Circuit has improperly cabined *Global Crossing* in a manner that will frustrate this Court's recognition of the balance Congress struck between private rights of action and FCC regulation.

In its first substantive application of *Global Crossing*[2], the Ninth Circuit has taken an unduly restrictive reading of that opinion. It has failed to heed *Global Crossing*'s recognition of the Act's nuanced blend of traditional regulation with competition-inducing provisions, a framework in which Congress

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[2] *Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009), involving a petition challenging various NRC rulemaking activities, cited *Global Crossing* merely in support of two routine points of administrative law. And in *Western Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008), arising out of an arbitration over failed negotiations to reach an interconnection agreement, the court considered but ultimately sidestepped the issue of whether there is a private right of action under § 207 for failure to negotiate in good faith. It remanded the matter with a suggestion that if the district court needed to decide the "complex" issue, it solicit the FCC's views as *amicus curiae*. *Id.* at 1205.

specifically chose not to alter the ability to bring a private right of action under § 207 for a carrier's failure to pay compensation, and gave the FCC the option to exempt CMRS providers from that section – which the FCC expressly declined to do. *Global Crossing*'s test for the propriety of a private right of action is whether the FCC *could* properly find that a failure to pay compensation is an "unjust or unreasonable" practice under 47 U.S.C. 201(b) – not that the FCC actually has done so.

Global Crossing involved a long-distance carrier that refused to reimburse a payphone operator for free payphone calls the latter was obligated to allow under the Telephone Operator Consumer Services Improvement Act of 1990, 104 Stat. 986, codified at 47 U.S.C. § 226. Recognizing that that obligation would impose a cost on payphone operators, the statute also directed the FCC to prescribe regulations providing for fair compensation, and the FCC had done so, ordering carriers to pay such reimbursement in a specified amount unless the carrier and operator agreed on a different sum. 550 U.S. at 51-52, *citing* 47 U.S.C. § 276(b)(1)(A) and *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 2545 (1999) (Compensation Order) and 47 C.F.R. § 64.1300(d) (2005). The FCC issued a second order determining that a carrier's refusal to pay the compensation ordered amounted to an "unreasonable practice" under 47 U.S.C. § 201(b). *Id.*, *citing In re the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 F.C.C.R. 19975, 19990, ¶ 32 (2003) (2003 Payphone Order). Metrophones, a payphone operator, then sued Global Crossing in Federal court, alleging that the

latter's refusal to pay amounted to a violation of § 201(b), for which suit was authorized under § 207.

This Court agreed, explaining that, in determining whether a private right of action based on a carrier's refusal to pay compensation may be stated under 47 U.S.C. § 207, the inquiry is whether the FCC *could* properly find the conduct at issue to be an "unreasonable practice" under 201(b). It based that conclusion on the text of § 207, which says that "[a]ny person claiming to be damaged by any common carrier...may bring suit" against the carrier in Federal court for "recovery of the damages for which such common carrier *may be liable* under the provisions of this chapter." 47 U.S.C. § 207 (emphasis added). As Justice Breyer's opinion explained, "[t]his language makes clear that the lawsuit is proper *if* the FCC could properly hold that a carrier's failure to pay compensation is an 'unreasonable practice' deemed 'unlawful' under § 201(b)." 550 U.S. at 52-53 (emphasis in original). Addressing the interplay between 201(b) and its implementing regulations, the Court noted that "[i]nsofar as the statute's language is concerned, to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute. *Id.* at 54 (emphasis in original) (citing, *inter alia*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute").

In its decision in this case, the Ninth Circuit read as self-limiting *Global Crossing*'s observations that the FCC is not "required to find carriers' failures to divide revenues to be § 201(b) violations in every instance," and that not every violation of FCC regulations is an "unjust and unreasonable practice." (App., *infra*, 22a,

citing Global Crossing at 56). Based on that, the Ninth Circuit views *Global Crossing* as permitting a § 207 private action only upon the FCC's actual prior finding "that the failure to follow a Commission, *e.g.*, rate or rate-division determination made under a different statutory provision is unjust or unreasonable under § 201(b)." *Id.*, *citing Global Crossing* at 60. In other words, the Ninth Circuit requires a *specific* FCC determination that a *specific* CMRS provider's failure to compensate a *specific* CLEC constitutes an "unreasonable practice" in violation of § 201(b), before allowing a private right of action under § 207. Because there is no such determination here, the court reasoned, North County's action under § 201(b) must be dismissed. (App., *infra*, 23a).

That reading of *Global Crossing* is unduly limiting. *Global Crossing* found the 2003 Payphone Order a valid "unreasonable practice" determination by the FCC because the refusal to reimburse payphone operators, as directed by the Compensation Order, could in ordinary English be deemed a "practic[e]...in connection with [furnishing a] communication service...that is...unreasonable." 550 US at 55. So too, here. In the *T-Mobile Decision*, the FCC reiterated the obligation for the payment of reciprocal mutual compensation between LECs and CMRS providers – and particularly, that the originating carrier (whether LEC or CMRS provider) pay reasonable compensation to the terminating carrier for traffic terminated through the latter's network facilities. *T-Mobile Declaratory Ruling*, 20 F.C.C.R. 4862, ¶ 12; TAC, ¶ 19. The FCC further concluded that, absent an interconnection agreement or a reciprocal compensation agreement between the parties, it was proper for a LEC (which necessarily includes CLECs)

to be compensated for traffic sent to its end-users that originated with CMRS providers pursuant to a filed tariff, for the period preceding April 29, 2005. *Id.* at 4862-64, ¶¶ 13-14.

Given those conclusions, ordinary English supports a finding that an originating CMRS provider's refusal to pay reasonable compensation to a terminating carrier, either pursuant to mutual agreement (after April 29, 2005) or to a filed tariff (prior to that date), also is an "unjust or unreasonable...practice" under § 201(b), giving rise to a private right of action under § 207 – even absent a particularized formal finding by the FCC. Requiring a CLEC such as North County to obtain an FCC determination, where the CMRS providers undisputedly are free-riding and have neither entered into a compensation agreement with, nor paid, the CLEC, would be an exercise in futility that would accomplish nothing beyond burdening both the CLEC and the FCC. By imposing a requirement of a (second) formal FCC finding, the Ninth Circuit has erected a barrier to CLECs not found anywhere in the statute or *Global Crossing*.

It also has disregarded the plain text of § 207, App. 74a, which gives an aggrieved party such as North County the option of filing a complaint with the FCC or suing in Federal court, though not both: the Ninth Circuit effectively has locked the courthouse door, and directed CLECs in the first instance to the FCC.

Moreover, the FCC *has* made a specific determination sufficient to meet even the Ninth Circuit's reading of *Global Crossing* – two of them, in fact. In *North County Communications Corp. v. MetroPCS California, LLC*, 24 F.C.C.R. 3807 (2009),

North County's FCC action against another CMRS provider, the FCC assumed that the identical conduct at issue here "could constitute a violation of § 201(b) of the Act," though it held the matter in abeyance pending action by the California PUC on an appropriate rate. *Id.* at 3816 ¶ 20, n.72. While the FCC made that assumption purely for purposes of that case, elsewhere it has stated its view more concretely: "Rule 20.11(b) requires an originating carrier to pay the terminating carrier compensation for intrastate traffic at a rate established by the state commission." May 27, 2010 brief of the FCC in *MetroPCS California, LLC v. FCC*, D.C. Cir. No. 10-1003. Under *Global Crossing*, that liability determination stands as proof not only that the FCC "could properly hold that a carrier's failure to pay compensation is an 'unreasonable practice' deemed 'unlawful' under § 201(b) " but that it actually *has done so*.

Thus, to the extent the Ninth Circuit reads *Global Crossing* to require an actual FCC determination, App. 17a-18a n.5, one has been made.

Similarly, the FCC has made an actual finding as to tariffs such as that under which North County seeks compensation in Count III, for 2002-05. In the *T-Mobile Declaratory Ruling* it fully considered, and rejected, the request of Respondent T-Mobile and other CRMS providers to invalidate such tariff claims, and found that for the period prior to April 29, 2005, tariffs were lawful and valid. 20 F.C.C.R. 4862-63, ¶ 13. Respondents' failure to pay those amounts thus violates 47 C.F.R. § 20.11(b)(2) and constitutes an "unjust or unreasonable practice" under § 201, giving rise to an action for damages in Federal court under

§§ 206 and 207. (App. E, *infra*, 73a-75a). Any other conclusion simply ignores *Global Crossing*.[3]

Respondents essentially seek exemption from § 207 with regard to actions by CLECs seeking compensation. And the Ninth Circuit's ruling has given it to them, erroneously. Congress in 47 U.S.C. § 332(c)(1)(A) gave the FCC specific authority to exempt CMRS providers from § 207, and the FCC has expressly declined to do so. *See* 47 C.F.R. § 20.15(a).

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[3] Though the Ninth Circuit dismissed the tariff claim as arising under State law, North County plainly pleaded it as a Federal claim, TAC, ¶ 26, and properly so. In *Baraga Tel. Co. v. Am. Cellular Corp.*, No. 2:05-CV-242, 2006 U.S. Dist. LEXIS 46983 (W.D. Mich. July 12, 2006), the court noted that while plaintiff-LEC's complaint for termination fees owed by a CMRS provider under a State-filed tariff claim was not completely preempted for purposes of removal jurisdiction, its ruling was based on the fact that plaintiff had specifically framed its complaint to allege only State-law causes of action. Thus, while the well-pleaded complaint rule prevented its removal to Federal court, plaintiff's claim "will be decided upon an issue of federal law" – specifically, §§ 251 and 252 of the Act, and the *T-Mobile Declaratory Ruling* – and could well have been brought in Federal court had plaintiff so chosen. 2006 US Dist LEXIS at ** 32-45. Here, obviously, North County has so chosen, and thus Federal jurisdiction exists over its tariff claim. *See also*, *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002) (jurisdiction existed over Verizon's request for declaration that State PSC erred in ordering it to pay reciprocal compensation; "even if § 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U.S.C. § 1331 to review the Commission's order for compliance with federal law....[w]e have no doubt that federal courts have jurisdiction under § 1331 to hear such a suit") (emphasis in original); 47 U.S.C. § 414 (nothing in the Act "shall in any way abridge or alter the remedies at common law or by statute, but the provisions of this chapter are in addition to such remedies").

This Court has not hesitated to grant certiorari to review a circuit court's misinterpretation of one of its rulings, *Elder v. Holloway*, 510 U.S. 510 (1994) (correcting circuit court's misapplication of *Davis v. Scherer*, 468 U.S. 183 (1984)); *Upshaw v. United States*, 335 U.S. 410 (1948) (reversing based on circuit court's failure to apply *McNabb v. United States*, 318 U.S. 332 (1943)), or where the ruling below indicates potential ambiguity in prior opinions of the Court, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). Because *Global Crossing*'s message has been fundamentally misinterpreted either by the Ninth Circuit or by the Nation's CLECs, certiorari is appropriate.

B. The issue presented is of great practical importance.

The decision below also involves questions of exceptional national importance. With the 1996 Act, Congress sought to replace regulation with competition to the greatest extent possible, consistent with the public interest. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 547 (8th Cir. 1998), *citing* 47 U.S.C. § 257(b). The Act expresses Congress' preference for a pro-competitive, deregulatory national policy framework for the industry, *Id.*, *citing In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, First Report and Order* (CC Docket Nos. 96-262, 94-1, 91-213, 95-72), FCC 97-158, 12 F.C.C.R. 15982 (1997), ¶ 1, and supplants local telephone monopolies with a telecommunications policy that strongly favors, and sometimes mandates, competition. *Global Crossing*, 550 U.S. at 50.

As part of this new framework, Congress engrafted onto the existing telephone regulatory system – an outgrowth of 19th-Century regulatory efforts with regard to railroads, public utilities and other common carriers – a hybrid system that would encourage competition, but at the same time not abandon traditional regulatory requirements (such as §§ 201(b) and 207) that divide authority between the regulatory agency and the Federal courts. *Id.* at 48-50. The goal was not regulation for regulation's sake, but rather the addition of regulatory mechanisms aimed at increasing the number of LECs, so as to increase innovation in the provision of local telecommunications services. Salvatore Massa, Mark E. Meitzen & Steve G. Parsons, *Pricing Network Elements under the Telecommunications Act of 1996: Back to the Future*, 23 HASTINGS COMM. & ENT. L. J. 751, 752 (Summer 2001). The Act attempts to encourage new entries into local-exchange services in various ways, one of which is to require interconnection of physical networks and reciprocal compensation between carriers for the transport and termination of local traffic. *Id.*

It would be antithetical to the pro-competition goals underlying the 1996 Act to allow Respondents – among the oldest, most-entrenched firms in the industry – to continue free-riding on CLECs such as North County. Respondent Verizon Wireless makes the implausible claim that North County seeks to "tip the competitive scales" in favor of CLECs and against CMRS providers, Brief on Appeal, p. 1, but North County seeks only to be paid by Respondents for their traffic that the Act requires it to terminate. If that constitutes "tipping the competitive scales" from their current imbalanced position, it's in a direction wholly consistent with Congress's intent.

Requiring North County and other CLECs to return to the FCC for a second administrative determination, where the FCC already has imposed on CMRS providers a duty to pay reasonable compensation, 47 C.F.R. § 20.11(b)(2), also would do nothing to further the mixed regulatory system now in place. In "ordinary English" one can call a refusal to pay any compenation above zero an "unreasonable or unjust...practice," and thus violative of § 201(b). As in *Global Crossing*, here too there is an explicit statutory scheme of which compensation "is necessary to the proper implementation of that scheme." 550 U.S. at 56.

The marketplace created by the 1996 Act has a tremendous interest in seeing *Global Crossing* given its proper reading. At present, CMRS providers are systematically and unreasonably refusing to pay for termination of traffic originating on their networks, notwithstanding §§201(b), 251, and 252, and 47 C.F.R. § 20.11(b)(2). Further, while the 2005 amendment to § 20.11(b) gave ILECs the right to compel arbitration with CMRS providers over compensation arrangements, no corresponding right was given to CLECs. There are hundreds of CLECs that are not being compensated and are suffering economic hardship; many have either gone out of business, or are on the verge of doing so, because of their inability to obtain compensation from CMRS providers.

Allowing larger, well-established carriers to exploit the CLECs' networks and free-ride upon them – while simultaneously denying these smaller carriers the right to a swift remedy in the Federal courts – is harmful to the telecommunications industry as a whole. Correcting the Ninth Circuit's

misinterpretation of *Global Crossing* would be a large step toward restoring the balanced, competitive market Congress envisioned.

C. Requiring a CLEC to accept incoming traffic for which the originating party may refuse to compensate it is a taking for which just compensation is owed.

If the Ninth Circuit's cramped reading of *Global Crossing* is not reviewed, an even larger question beckons for this Court's attention. Under modern takings law, "mandatory interconnection [under the 1996 Act] is a physical taking and is possibly a regulatory taking." Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 400-401 (2004), *citing* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 946-948 (May 2003), *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). "A carrier that must unwillingly accept traffic from another carrier has its physical premises invaded by such traffic – just as the homeowner in *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)] had its property invaded by a cable connection." Candeub at 401; *but see* David Gilo, *A Market-Based Approach to Telecom Interconnection*, 77 S. CAL. L. REV. 1, 6 & n.10 (Nov. 2003) (noting split among academic literature as to whether forced interconnection constitutes a taking without just compensation).

Section 251(a)(1) of the Act unambiguously imposes on CLECs like North County the duty to interconnect with CMRS providers and terminate their calls.

Likewise, § 251(b)(5) imposes on CLECs the duty to establish reciprocal compensation arrangements with CMRS providers for the transport and termination of calls. But if the Ninth Circuit and Respondents are correct, neither Congress nor the FCC gave CMRS providers a corresponding duty to pay for § 251(a)(1) interconnectivity, nor an obligation to actually engage in § 251(b)(5) negotiations.

The Fifth Amendment's bar against taking private property for public use without just compensation is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Under the Ninth Circuit's ruling, North County and other CLECs will continue to be forced to bear just such a public burden.

Admittedly, this issue was neither raised nor passed on below. And while this Court typically does not review such questions, that rule "is not inflexible," particularly in cases coming from the federal courts. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-698 (1984); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976). If the Ninth Circuit's ruling is allowed to stand, North County and CLECs around the country effectively will be condemned to committing their own networks and scarce resources to provide termination, free of charge and indefinitely, to some of the largest wireless carriers in the country, until such (improbable) time as the latter decide they wish to start paying, or negotiate a reciprocal agreement – or the FCC decides to process a complaint. And all of this will take place under the rubric of the Act and its regulations.

Given the "fairness and justice" principles underlying the Takings Clause, this certainly presents a sufficiently important issue for this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-55048
D.C. No. CV-06-01542-LAB

[Filed February 10, 2010]

NORTH COUNTY COMMUNICATIONS CORP.,
Plaintiff-Appellant,

v.

CALIFORNIA CATALOG & TECHNOLOGY, d/b/a CTT Telecomms (OCN 573B),
Defendant,

TGEC COMMUNICATIONS CO. LLC, CA (OCN 5969); UNITED STATES CELLULAR CORP-CALIFORNIA, (OCN 6261); GTE MOBILNET OF TAMPA, INC., (OCN 6339); ARCH WIRELESS HOLDINGS, INC., (OCN 6630); EL DORADO CELLULAR, d/b/a Mountain Cellular (OCN 6980); BROOKS FIBER PROPERTIES, INC., (OCN 7219); THE OTHER PHONE COMPANY, INC., (OCN 7452); CHARTER FIBERLINK CA-CCO LC, (OCN 776C); FIRSTWORLD

SO. CA, (OCN 7839); A+ WIRELESS INC.,)
d/b/a Advantage Wireless-CA (OCN 822A);)
MPOWER COMMUNICATIONS CORP-CA,)
(OCN 8322); CHOICE TELECOMM,)
LLC-CA (OCN 885B); TRANS NATIONAL)
COMMUNICATIONS INTL, INC.-CA)
(OCN 864C); COMMPARTNERS, LLC-CA)
(OCN 869C); ALLEGIANCE TELECOM,)
INC.-CA (OCN 8782); ONESTAR)
COMMUNICATIONS, LLC-MD (OCN 9992);)
INTEGRATED COMMUNICATIONS)
CONSULTANTS, INC.-CA (OCN 9397);)
NTCH-CALIFORNIA, INC. (OCN 9607);)
TELEMEX INTERNATIONAL-CA)
(OCN 998B); BAY AREA CELLULAR)
TELEPHONE; PACIFIC CENTREX)
SERVICES, INC.-CA (OCN 3662); BULLSEYE)
TELECOM, INC.-CA (OCN 069A); COMM)
SOUTH COMPANIES, INC.-CA (OCN 4 00A);)
ARRIVAL COMMUNICATIONS, INC.-CA (4553);)
BLUE CASA COMMUNICATIONS LLC-CA)
(OCN 111B); COMCAST PHONE OF)
CALIFORNIA LLC-CA (OCN 7610);)
COMMUNICATIONS EXPRESS INC., d/b/a)
Com Express; ECI COMMS INC., d/b/a ITS)
Network Services-CA (OCN 3630); ERNEST)
COMMUNICATIONS, INC.-CA (OCN 4961);)
EXCEL TELECOMMUNICATIONS, INC.-CA)
(OCN 243A); EXPRESS TELEPHONE)
SERVICES, INC.-CA (OCN 093A); GLOBAL)
NAPS CALIFORNIA, INC.-CA (OCN 5300);)
IN TOUCH COMMUNICATIONS, INC.-CA)
(OCN 047B); LIGHTYEAR NETWORK)
SOLUTIONS, LLC-CA (OCN 5370); MCGRAW)
COMMUNICATIONS, INC. (OCN 5597);)
METROPOLITAN TELECOMMS)

CALIFORNIA, D/B/A Mettel-CA (OCN 180A); PNG TELECOMMS d/b/a Powernet Global Comms CA (OCN 240B); POINTE COMMUNICATIONS CORP-CA (OCN 2595); PREFERRED CARRIER SERVICES, INC., d/b/a Phones For All (OCN 5428); TELEPHONE SERVICE INCORPORATED, d/b/a FRIENDLYLEC CA (OCN 2015); VCOM SOLUTIONS, INC.-CA (OCN 334B); WHOLESALE AIR-TIME, INC.-CA (OCN 199B); LEAP WIRELESS INTL, INC. d/b/a Cricket Comm, Inc. (OCN 0822); BLUE LICENSES HOLDING LLC, (OCN 6010); PACIFIC BELL MOBILE SERVICES, (OCN 6672),

Defendants,

and

CELLCO PARTNERSHIP, d/b/a Verizon Wireless-CA (OCN 6006); CELLCO PARTNERSHIP, d/b/a Verizon Wireless-NM (OCN 6573); T-MOBILE USA, INC., (OCN 6529); CAL-ONE CELLULAR LP, (OCN 6604); PHONECO, L.P.-CA, (OCN 542B); CINGULAR WIRELESS; CRICKET COMMUNICATIONS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted
April 17, 2009—Pasadena, California

Filed February 10, 2010

Before: Johnnie B. Rawlinson and N. Randy Smith, Circuit Judges, and Claudia Wilken,* District Judge.

Opinion by Judge Rawlinson

COUNSEL

Appellant North County Communications is represented by Joseph G. Dicks (argued) and Christopher J. Reichman, Dicks & Workman, San Diego, California.

Appellee Cal-One Cellular L.P. and Cellco Partnership are represented by John Hueston and Laura W. Brill (argued), Irell & Manella, Los Angeles, California.

Appellees T-Mobile USA, Cingular Wireless, and Cricket Communications, Inc. are represented by Martin L. Fineman, Suzanne K. Toller, and Gregory J. Kopta (argued), Davis Wright Tremaine LLP, San Francisco, California.

Appellee PhoneCo, L.P. is represented by Alan E. Greenberg and Kelly A. Van Nort, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, San Diego, California.

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

OPINION

RAWLINSON, Circuit Judge:

The dispute in this telecommunications case stems from Appellant North County Communication's (North County) contention that it has a private right of action to enforce various compensation arrangements pursuant to the Federal Communications Act. In its complaint, North County, a competitive local exchange carrier (CLEC), alleged that Appellees, as commercial mobile radio service (CMRS) providers, failed to properly compensate North County for terminating their calls on North County's network.

North County challenges the district court's dismissal of its declaratory judgment claims for lack of subject matter jurisdiction. Specifically, the district court held that North County had no private right of action to enforce the compensation arrangements in federal court. On appeal, North County asserts that 47 U.S.C. §§ 251(b)(5), 201(b), 206 and 207, and the implementing Federal Communications Commission (Commission or FCC) regulation, 47 C.F.R. § 20.11, provide the requisite private right of action. We disagree, and affirm the district court's judgment.

I. BACKGROUND

A. Statutory and Regulatory Background

Prior to enactment of the 1996 Telecommunications Act, the Commission established rules governing connections between Local Exchange Carriers (LECs) and CMRS providers. These rules required "mutual compensation for the exchange of traffic between LECs

and CMRS providers." *In The Matter of Developing a Unified Intercarrier Compensation Regime* (*T-Mobile Decision*), 20 F.C.C.R. 4855, 4856, ¶ 2 (2005) (footnote reference omitted). "In particular, the rules required the originating carrier, whether LEC or CMRS provider, to pay reasonable compensation to the terminating carrier in connection with traffic that terminates on the latter's network facilities." *Id.* at 4856, ¶ 2 (footnote reference omitted).

The Commission eventually determined that 47 U.S.C. § 251(b)(5) "obligates LECs to establish reciprocal compensation arrangements for the exchange of intraMTA [Major Trading Area] traffic between LECs and CMRS providers." *Id.* at 4856, ¶ 3 (footnote reference omitted). For traffic originating and terminating within the same MTA, reciprocal compensation obligations under § 251(b)(5), rather than interstate or intrastate access charges, applied. *See id.* at 4856-57, ¶ 3 (footnote references omitted).

"Although section 251(b)(5) and the Commission's reciprocal compensation rules reference an arrangement between LECs and other telecommunications carriers, including CMRS providers, they do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other." *Id.* at 4857, ¶ 4 (footnote reference and internal quotation marks omitted). This lack of guidance generated a legion of disputes among the carriers, *see id.* at 4858, ¶ 6, and prompted clarification from the Commission.

As the existing rules did not expressly preclude the filing of tariffs to set compensation, the Commission clarified that the reciprocal compensation rules did not, at that time, prohibit incumbent LECs from filing state termination tariffs, which CMRS providers were obligated to accept. *See id.* at 4860, ¶ 9. "Because the existing compensation rules [were] silent as to the type of arrangement necessary to trigger payment obligations, [the Commission found] that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff." *Id.* at 4860, ¶ 10 (footnote reference omitted). However, the Commission also "amend[ed] [its] rules to make clear [its] preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff." *Id.* at ¶ 9 (footnote reference omitted).[1]

Upon the effective date of the Commission's amendments, any "existing wireless termination tariffs [would] no longer apply." *Id.* at 4863, ¶ 14.

B. The District Court's Dismissal of North County's Third Amended Complaint

According to its third amended complaint, North County "is a CLEC that provides switched and non-switched local exchange, exchange access, and other telecommunication services to end users in

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[1] "[T]he term 'non-access traffic' refers to traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act [reciprocal compensation arrangements] and ISP-bound traffic." *T Mobile Decision*, 20 F.C.C.R. at n.6 (internal quotation marks omitted).

California." North County alleged that the defendant-appellees "are CMRS and CLEC providers that offer calling plans allowing calls to areas serviced by [North County]."

North County asserts that it "incurs costs in terminating calls sent to [its] end users by the Defendants' end users." North County alleged that defendant-appellees "knowingly send traffic to [North County] in the absence of an interconnection agreement or a reciprocal compensation agreement[2] for [North County] to terminate to its end users customers. As a common carrier, [North County] is obligated to terminate calls received from other carriers to [North County's] end users."

North County alleged that it "began sending monthly bills to the Defendants for traffic termination in January, 2003," and that it "billed the Defendants $ 0.004 per minute and $0.007 per call set-up, before increasing its rate to the prevailing market rate of $0.011 per minute." According to North County, the defendants refused to pay the bills or enter into a compensation arrangement.

Relying on the *T-Mobile Decision*, North County contended that "it is proper for a LEC, like [North County], to be compensated for traffic sent to its end-users that originates with CMRS providers pursuant to its tariff on file." *North County*

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[2] North County defined reciprocal compensation as "the payment arrangement that recovers the costs incurred for the transport and termination of local telecommunication traffic originating on one party's network and terminating on the other party's network."

acknowledged that the Commission "limited the scope of this finding to time periods preceding April 29, 2005, the effective date of the amendments to 47 C.F.R. section 20.11 promulgated by the T-Mobile Decision." According to North County, "CMRS providers still remained obligated to comply with the principles of mutual compensation and to pay reasonable compensation to the LEC for the termination of traffic that originates with the CMRS provider."

In its first cause of action, North County sought declaratory judgment, alleging that "it is entitled to be compensated for the termination of traffic which the Defendants sent and continue to send to [North County's] end users . . ." North County recognized that "while determining the precise rate of compensation for termination of traffic, including call set-up and minutes of use, under these circumstances may be a matter beyond the expertise of this court and within the expertise of the appropriate regulatory body, the FCC has also indicated that 'collection actions' do not state a cause of action under its rules." North County requested that the district court determine:

> (1) the number of calls and the number of minutes originating on the Defendants' networks and terminated on [North County's] network from April 29, 2005 up through the time of trial, (2) that [North County] is entitled to receive mutual compensation for the termination of calls to [North County's] end-users which originate on the Defendants' networks, and (3) that the Defendants are required to commit to compensate [North County] at a rate to be determined by the appropriate regulatory body, or else refrain

> from sending any traffic to [North County's] end-users and refrain from taxing [North County's] limited resources, (4) that the Defendants' conduct amounts to an unjust and unreasonable practice in violation of section 201 and 202 of the Federal Communications Act (47 U.S.C. §§ 201, 202) which has damaged [North County] (47 U.S.C. §§ 206, 207).

North County's second cause of action is premised on quantum meruit. North County alleged that "Defendants knowingly accepted, used, enjoyed and benefitted from the services provided by [North County]." According to North County, "[i]t would be unjust to allow the Defendants to have the benefit of [North County's] services without paying reasonable compensation for these benefits and the Defendants should be so ordered to pay." North County sought damages "covering the period beginning April 29, 2005 and continuing up through the time of trial."

In its third cause of action, North County asserted damages pursuant to the applicable tariff "covering the period beginning 3 years before the filing of this complaint and continuing up to and including April 28, 2005."

The district court granted defendant-appellees' motion to dismiss, holding that it lacked subject matter jurisdiction, because North County failed to properly allege a federal claim. The district court also concluded that declaratory judgment "would not achieve the objectives of granting such relief." North County filed a timely notice of appeal.

II. STANDARDS OF REVIEW

"We review *de novo* dismissals under Rules 12(b)(1) and 12(b)(6)." *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) (citing *Holcombe v. Hosner*, 477 F.3d 1094, 1097 (9th Cir. 2007)). "For the purposes of reviewing such dismissals, and where, as here, no evidentiary hearing has been held, all facts alleged in the complaint are presumed to be true." *Id.* (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995)) (alterations and internal quotation marks omitted).

"District court decisions about the propriety of hearing declaratory relief actions are reviewed for abuse of discretion." *Id.* (quoting *Wilton*, 515 U.S. at 289-90) (alterations and internal quotation marks omitted).

"Although we review the ultimate decision to decline to exercise jurisdiction for abuse of discretion, we conduct *de novo* review of the court's application of the primary jurisdiction doctrine[.]" *Id.* at 1162 n.11 (citations omitted).

III. DISCUSSION

A. North County's Declaratory Judgment Act Claims

[1] North County's claims are hampered by the very relief it seeks — a declaratory judgment. "[T]he Declaratory Judgment Act does not by itself confer federal subject-matter jurisdiction[.]" *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005). "As required by Article III, courts may adjudicate only actual cases or controversies."

Rhoades, 504 F.3d at 1157 (citation omitted). "The disagreement underlying the declaratory relief action must not be nebulous or contingent but must have taken on a fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Id.* (quoting *Pub. Serv. Comm'n v. Wycott Co. Inc.*, 344 U.S. 237, 244 (1952)) (alteration omitted).

[2] North County contends that the district court has subject matter jurisdiction under the Declaratory Judgment Act because the Federal Communications Act creates a private right of action for violations of its compensation requirements. "Where a federal statute does not explicitly create a private right of action, a plaintiff can maintain a suit only if Congress intended to provide the plaintiff with an implied private right of action." *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th Cir. 2008) (quoting *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121 (9th Cir. 2000)) (alteration and internal quotation marks omitted). "Accordingly, the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 1231 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)) (alteration and internal quotation marks omitted).

Thus, it is not enough for North County to broadly proclaim that it is entitled to compensation under the Federal Communications Act. Instead, North County "must demonstrate that a federal *statute* vests [North County] with such a right." *Rouse v. United States Dep't of State*, 567 F.3d 408, 418 (9th Cir. 2009), *as amended* (citation omitted) (emphasis in the original).

"Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Id.* (quoting *Alexander*, 532 U.S. at 291) (parentheses and footnote reference omitted).

A broad assertion of a private right of action is not easily maintained under the Federal Communications Act, as our statutory analysis is intertwined with the requisite deference to the Commission's interpretation of the Federal Communications Act. This is so because "the FCC is the agency that is primarily responsible for the interpretation and implementation of the Telecommunications Act and of its own regulations." *Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047, 1052 (9th Cir. 2003) (citation omitted); *see also Howard v. AOL*, 208 F.3d 741, 752 (9th Cir. 2000) ("Congress created the FCC to enforce the Communications Act. The Supreme Court's opinions have repeatedly emphasized that the FCC's judgment regarding how the public interest is best served is entitled to substantial judicial deference.") (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)) (alteration and internal quotation marks omitted). Absent a supporting Commission determination, and with no showing of Congressional intent to create a private right of action, North County cannot assert a viable claim for relief. *See Greene*, 340 F.3d at 1050-51.

In support of its contention that it has a private right of action to seek compensation from the CMRS providers in federal court, North County relies on 47 C.F.R. § 20.11(b); 47 U.S.C. § 251(b)(5); 47 U.S.C. § 201(b); 47 U.S.C. § 206; and 47 U.S.C. § 207. We examine each of these cited sources to determine if the referenced statutory or regulatory language provides

for a private right of action or for a private remedy. We simultaneously consider any relevant determinations from the Commission. Applying this two-fold analysis and deferring to the Commission's primary jurisdiction, we conclude that 47 U.S.C. § 251(b) and 47 C.F.R. § 20.11(b) cannot support North County's claims for declaratory relief. "The primary jurisdiction doctrine is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1200 (9th Cir. 2008) (citation and internal quotation marks omitted). "[T]he primary jurisdiction doctrine is designed to protect agencies possessing quasi-legislative powers and that are actively involved in the administration of regulatory statutes." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (citation and internal quotation marks omitted). "Charged with the administration of the Telecommunications and Federal Communications Acts, the FCC is such an agency." *Id.* (citation omitted). Under the primary jurisdiction doctrine, courts may decline to decide issues that are "within the special competence of an administrative agency." *Id.* at 1114. Specifically, the Commission's determinations that 47 U.S.C. § 251(b) is inapplicable to CMRS providers, and that the Commission is the appropriate forum for pursuing compensation under 47 C.F.R. § 20.11(b) are fatal to North County's contention. We also conclude that North County's declaratory judgment claims premised on 47 U.S.C. § 201(b) are fatally flawed because the Commission has not determined that the CMRS providers' lack of compensation to CLECs violates § 201(b). Finally, we hold that, because North County cannot establish an

independent right to compensation, 47 U.S.C. § 206 and § 207 are not viable vehicles for it to seek relief.

1. 47 C.F.R. § 20.11(b)

47 C.F.R. § 20.11(b) provides:

> Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation. (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier. (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

[3] Pursuant to 47 U.S.C. § 251(b)(5), "[e]ach local exchange carrier has the following duties: . . . The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

[4] According to North County, a violation of 47 C.F.R. § 20.11(b)'s compensation requirements is the equivalent of a violation of 47 U.S.C. § 251(b)(5) for which it has a federal remedy. However, nothing in the plain language of § 251(b)(5) provides for a right to compensation. Rather, § 251(b)(5) provides for the duties of local exchange carriers, not even mentioning CMRS providers. *See* 47 U.S.C. § 251(b)(5).

[5] Our reading of § 251(b)(5)'s plain language is bolstered by the Commission's determination that § 251(b) is inapplicable to CMRS providers. *In North County Commc'ns Corp. v. MetroPCS California, LLC*, 24 F.C.C.R. 3807 (2009), North County alleged that MetroPCS, a CMRS provider, failed to compensate North County for traffic terminated on North County's network. *See id.* at 3807-08, ¶¶ 1, 4. Rejecting North County's claims made pursuant to § 251, the Commission held:

> Section 251(b)(5) imposes a duty to establish reciprocal compensation only upon LECs. Moreover, the Commission has stated unequivocally that CMRS providers will not be classified as LECs and are not subject to the obligations of section 251(b). Therefore, as a CMRS provider, MetroPCS is not subject to the obligations arising directly from section 251(b) itself . . .

MetroPCS, 24 F.C.C.R. at 3814-15, ¶ 16 (footnote references and internal quotation marks omitted).

[6] The Commission also delineated the procedures that a private party must undertake in pursuit of reasonable compensation under 47 C.F.R. § 20.11(b). The Commission "decline[d] to determine, in the first instance, what constitutes reasonable compensation" under 47 C.F.R. § 20.11(b). *Id.* at 3810, ¶ 9 (footnote reference and internal quotation marks omitted). The Commission expounded that "the more appropriate venue for determining what constitutes reasonable compensation for North County's termination of intrastate traffic originated by MetroPCS is not this Commission, but rather the California PUC, via

whatever procedural mechanism it deems appropriate under state law (*e.g.*, complaint proceeding, declaratory ruling proceeding, generic cost or rulemaking proceeding)." *Id.* (internal quotation marks omitted).[3,4] The Commission explained that it would consider North County's claims once a determination of the rate of reasonable compensation was made by the appropriate state commission. *Id.* The Commission's ruling demonstrates that it is the proper forum for North County's claims premised on 47 C.F.R. § 20.11(b), once North County has met the predicate procedural requirements.[5]

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[3] The full FCC upheld the enforcement bureau's determination that "the California PUC is the more appropriate forum for determining the reasonable compensation rate for North County's termination of intrastate, intraMTA traffic originated by MetroPCS." *North County Commc'ns Corp. v. MetroPCS California, LLC*, No. EB-06-MD-007, FCC 09-100, 2009 WL 4005067, at *3, ¶ 12 (F.C.C. November 19, 2009). The full FCC also denied "the parties' Applications for Review regarding the forum issue primarily by affirming and incorporating by reference the reasoning and holdings of the *Bureau Merits Order*." *Id.* (footnote reference omitted).

[4] The Commission observed that its *T-Mobile Decision* was consistent with the conclusion that state commissions should initially determine the reasonable rate of compensation. *See MetroPCS*, 24 F.C.C.R. at 3812-13, ¶ 12; *see also North County Commc'ns Corp. v. MetroPCS California, LLC*, 2009 WL 4005067, at *4, ¶¶ 13-14.

[5] North County's assertion that the Commission equated a violation of 47 C.F.R. § 20.11 with a violation of the Federal Communications Act is unfounded. The Commission did not make such a determination. Rather, it "assume[d], *without deciding*, that a violation of rule 20.11 would be a violation of the Act cognizable under section 208 of the Act." *MetroPCS*, 24 F.C.C.R. at n.30 (citations omitted) (emphasis added). In any event, the

[7] We readily defer to the Commission's resolution of North County's claims asserted pursuant to 47 U.S.C. § 251, and its determination of the procedures applicable to claims made under 47 C.F.R. § 20.11(b). *See Fones4All Corp. v. F.C.C.*, 550 F.3d 811, 820 (9th Cir. 2008) ("[W]e are interpreting the FCC's regulations, and courts should give substantial deference to an agency's interpretation of its own regulations.") (citation and internal quotation marks omitted).[6,7]

Commission's determination demonstrates that the Commission, not the federal courts, should make this decision.

[6] North County maintains that CMRS providers are subject to the same regulations as common carriers under 47 U.S.C. § 332(c)(1)(A) and 47 C.F.R. § 20.15(a). However, these broad statutory and regulatory provisions appear to be limited to CMRS providers' general obligations under the Federal Communications Act. *See* 47 C.F.R. § 20.15(a) ("Commercial mobile radio services providers, to the extent applicable, must comply with sections 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, and 228 of the Communications Act"); *see also* 47 U.S.C. § 332(c)(1)(A) (deferring expressly to regulations promulgated by the Commission). The Commissions's recent decision regarding CMRS providers supports this conclusion. *See MetroPCS*, 24 F.C.C.R. at 3812, ¶ 11 (noting that § 332 does not apply to "intercarrier rates").

[7] North County's reliance on the *T-Mobile Decision* to establish a private right to compensation is also misplaced. In *T-Mobile*, the Commission considered a petition seeking "to reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic." 20 F.C.C.R. at 4855, ¶ 1 (footnote reference omitted). The Commission never addressed violations of 47 C.F.R. § 20.11, nor the remedies for such violations.

2. 47 U.S.C. § 201(b)

Section 201(b) provides in relevant part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]

[8] It is arguable that the plain language of § 201(b) contains an implication that private parties may pursue remedies for violations of the statute. However, given the broad language of the statute, a more reasonable interpretation is that it is within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation. *See In re Long Distance Telecomm. Litig.*, 831 F.2d 627, 631 (6th Cir. 1987), *as amended* ("This [charge of unreasonable practices] is a determination that Congress has placed squarely in the hands of the FCC.") (quoting *Consol. Rail Corp. v. Nat'l Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981)) (alteration and internal quotation marks omitted); *see also Greene*, 340 F.3d at 1049-50. However, the Commission has not determined that the CMRS providers' lack of payment to CLECs like North County violates § 201(b).[8] North

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[8] North County argues that the Commission concluded in MetroPCS that the CMRS providers' failure to pay reasonable compensation violated § 201(b). However, in *MetroPCS*, the Commission merely "[f]or purposes of [that] Order only, . . . assume[d], without deciding, that a CMRS carrier's failure to enter in good faith into an agreement with a CLEC regarding the

County essentially requests that the federal courts fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b). This we decline to do. The district court properly dismissed North County's declaratory judgment claim premised on § 201(b), because entry of a declaratory judgment "would . . . put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission." *Greene*, 340 F.3d at 1053 (quoting *Conboy v. AT&T* Corp., 241 F.3d 242, 253 (2d Cir. 2001)) (alteration and internal quotation marks omitted); *see also In re Long Distance Telecommunications Litig.*, 831 F.2d at 631.[9]

Our conclusion, that an FCC determination is integral to claims involving § 201(b), is bolstered by the Supreme Court's recent decision in *Global Crossing Telecommuns., Inc. v. Metrophones Telecommuns., Inc.*, 550 U.S. 45 (2007). In *Global*

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termination of intrastate traffic, and a failure to pay a CLEC for such termination, could constitute a violation of section 201(b) of the Act." *MetroPCS*, 24 F.C.C.R. at n.72 (citation omitted). The Commission simply did not make the determination that North County seeks.

[9] North County fails to provide any supporting authority evidencing Congressional intent to create a private right to compensation pursuant to § 201(b). *See In re Digimarc Corp. Derivative Litig.*, 549 F.3d at 1230-31 ("In the absence of clear evidence of congressional intent, we may not usurp the legislative power by unilaterally creating a cause of action. *Touche Ross* [*& Co. v. Redington*], 442 U.S. [560,] 578 [1979]). The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.") *Id.* (parenthesis omitted).

Crossing, the Supreme Court considered whether § 207 of the Telecommunications Act authorized a payphone operator to bring a federal claim against carriers who refused to pay compensation ordered by the FCC. 550 U.S. at 47. The FCC determined "that a carrier's refusal to pay the compensation ordered amounts to an unreasonable practice within the terms of § 201(b)." *Id.* at 52 (citation and internal quotation marks omitted). "That determination, it believed, would permit a payphone operator to bring a federal-court lawsuit under § 207, to collect the compensation owed." *Id.* (citation omitted). The Supreme Court opined that § 207's language "makes clear that the lawsuit is proper *if* the Commission could properly hold that a carrier's failure to pay compensation is an unreasonable practice deemed unlawful under § 201(b)." *Id.* at 52-53 (internal quotation marks omitted) (emphasis in the original).

In reviewing § 207, the Supreme Court noted the linkage between the statute's purpose and the FCC's regulations. "[T]he purpose of § 207 is to allow persons injured by § 201(b) violations to bring federal-court damages actions." *Id.* at 53 (citations omitted). "History also makes clear that the FCC has long implemented § 201(b) through the issuance of rules and regulations. This is obviously so when the rules take the form of FCC approval or prescription for the future of rates that exclusively are reasonable." *Id.* (citations omitted). "It is also so when the FCC has set forth rules that, for example, require certain accounting methods or insist upon certain carrier practices, while (as here) prohibiting others as unjust or unreasonable under § 201(b)." *Id.* (citations omitted). "Insofar as the statute's language is concerned, to violate a regulation that lawfully

implements § 201(b)'s requirements *is* to violate the statute." *Id.* at 54 (citation omitted) (emphasis in the original).

Given these statutory and regulatory considerations, the Supreme Court framed the issue as "whether the particular FCC regulation . . . lawfully implements § 201(b)'s unreasonable practice prohibition." *Id.* at 55. The Supreme Court opined that "[t]he carrier's refusal to divide the revenues it receives from the caller with its collaborator, the payphone operator, despite the FCC's regulation requiring it to do so, can reasonably be called a 'practice' 'in connection with' the provision of that service that is 'unreasonable.' " *Id.* (citation omitted).

However, the Supreme Court limited its holding, as it did "not suggest that the FCC is required to find carriers' failures to divide revenues to be § 201(b) violations in every instance." *Id.* at 56 (citation omitted). "Nor [did it] suggest that every violation of FCC regulations is an unjust and unreasonable practice. Here there is an explicit statutory scheme, and compensation of payphone operators is necessary to the proper implementation of that scheme. Under these circumstances, the FCC's finding that the failure to follow the order is an unreasonable practice is well within its authority." *Id.* "[T]he FCC properly implements § 201(b) when it reasonably finds that the failure to follow a Commission, *e.g.*, rate or rate-division determination made under a different statutory provision is unjust or unreasonable under § 201(b)." *Id.* at 60 (citations and emphasis omitted). "Moreover, in resting [its] conclusion upon the analogy with rate setting and rate divisions, the traditional, historical subject matter of § 201(b), [the Supreme

Court] avoid[ed] authorizing the FCC to turn §§ 201(b) and 207 into a back-door remedy for violation of FCC regulations." *Id.*[10]

[9] In contrast to the facts in *Global Crossing*, the Commission has not made any findings that CMRS providers' failure to compensate CLECs constitutes an unreasonable practice in violation of § 201(b). Because North County cannot demonstrate a violation of § 201(b) in the absence of an FCC determination, the district court properly dismissed North County's claims. *See Greene*, 340 F.3d at 1052-53.

Unable to demonstrate any statutory or regulatory violations for which there is a private right to compensation, North County fares no better in seeking declaratory judgment under 47 U.S.C. § 206 and § 207.

3. 47 U.S.C. § 206 and § 207

47 U.S.C. § 206 provides in pertinent part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter,

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[10] North County cites *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 489 F.3d 1249 (D.C. Cir. 2007). However, in that case, the D.C. Circuit considered whether violations of § 201(b) provide a private right of action for payphone service providers. *See id.* at 1250. The D.C. Circuit held that, in accordance with *Global Crossing*, "a violation of the regulation at issue is a violation of § 201(b) of the Act, for which a private right of action is authorized by § 207 of the Act, in effect creating a right of action to remedy a violation of the regulation itself." *Id.* (citation omitted). The D.C. Circuit's holding was based on the reasoning of *Global Crossing* and its reference to the predicate determination by the Commission of a regulatory violation, facts not present here.

> or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . .

[10] 47 U.S.C. § 207 provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

The plain language of §§ 206 and 207 establish procedures for private parties to pursue claims in federal court, but does not establish an independent private right of action for compensation. In Greene, we clarified that there must be an independent right to compensation for a private right of action to lie under §§ 206 and 207. *Greene*, 340 F.3d at 1050-51 ("Because the private right of action created by §§ 206 and 207 extends only to violations of this chapter, and § 276 does not require IXCs to compensate PSPs, there is no violation of § 276 for which a private action explicitly lies for payphone compensation.") (internal quotation

marks omitted). Similarly, because North County has failed to establish a right to specific compensation pursuant to any statute or regulation, §§ 206 and 207 cannot form the basis for its compensation claims. *See id.*

[11] We have also held that claims pursuant to § 207, like those premised on § 201(b), are particularly amenable to resolution by the FCC. In *W. Radio Servs. Co.*, we considered whether the district court had subject matter jurisdiction over claims that an ILEC failed to negotiate an interconnection agreement in good faith. 530 F.3d at 1189. We observed that "issues regarding the applicability of § 207 are complex and should not be decided without the participation of the FCC, the agency principally responsible for the enforcement of the Telecommunications Act." *Id.* at 1204. "Whether § 207 provides a cause of action may, in fact, have an impact on FCC regulation in other contexts. For example, determining whether § 207 provides a private right of action . . . may involve interpreting the relationship between the terms common carrier, local exchange carrier, and telecommunications carrier. Section 207 refers to damages caused by a common carrier." *Id.* (internal quotation marks omitted). "On the one hand, the statutory definitions and the use of the terms in other provisions of the Acts suggest that local exchange carriers are not necessarily a subset of common carriers." *Id.* (citations omitted). "On the other hand, the statutory definition of telecommunications carrier — a term which is used along with local exchange carrier in § 252 — as well as FCC guidance on the relationship between common carriers and telecommunications carriers, suggests that local exchange carriers may be common carriers for

purposes of § 207." *Id.* (citations and internal quotation marks omitted). "As all three terms are frequently used throughout the telecommunications acts, interpreting them may have consequences in areas of telecommunications law other than the reach of § 207." *Id.* at 1205. We opined:

> In addition, interpretation of § 207 potentially implicates the jurisdiction of the F.C.C. Section 207 offers aggrieved individuals a choice of remedies for alleged violations of the Telecommunications Act: they may go to the F.C.C., presumably by bringing a complaint under § 208—which provides a mechanism for filing complaints before the F.C.C.—or to a district court. Given that the statute provides a choice between these two remedies, it may be logical to expect that if a claim can be brought in district court under § 207, it also may be brought to the F.C.C. under § 208. On the other hand, the F.C.C. has never directly decided whether it has jurisdiction over good faith claims . . .

Id. Because of this complexity, § 207 does not lend itself to declaratory relief.[11]

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[11] North County also posits, without legal support, that the CMRS providers' payment to other LECs, and not North County, constitutes a discriminatory practice prohibited by 47 U.S.C. § 202(a). North County has waived this argument. *See Maldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009) ("Arguments made in passing and inadequately briefed are waived.") (citation omitted). In any event, the Commission has rejected North County's claims under § 202(a) against CMRS providers. *MetroPCS*, 24 F.C.C.R., at 3817, ¶ 22.

[12] We, therefore, conclude that the district court properly dismissed North County's declaratory judgment claims, as North County cannot demonstrate a right to compensation under any statute or regulation that is enforceable pursuant to a federal private right of action.[12]

B. North County's State Law Claims

[13] North County's second cause of action was for quantum meruit and its third cause of action sought compensation pursuant to a state tariff. Because the district court dismissed North County's federal claims for lack of subject matter jurisdiction, the district court lacked jurisdiction over North County's state claims. *See Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001) ("If the District Court had original jurisdiction, but dismissed for non-jurisdictional reasons, then it could maintain supplemental jurisdiction at its discretion. If it dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction.") (quoting *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997)).

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[12] North County also contends that the federal courts are the proper forum for resolving its claims because the Commission does not decide collection actions. However, the Commission has ruled that once North County seeks a rate of reasonable compensation from the relevant state commission, the Commission would be able to resolve North County's "collection" claims. *See MetroPCS*, 24 F.C.C.R. at 3810-11, ¶ 9.

C. The District Court's Dismissal Of North County's Claims With Prejudice[13]

[14] "The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark*, 523 F.3d at 1114. Given the Commission's consideration of North County's compensation claims in *MetroPCS* and the absence of a Commission determination regarding whether the CMRS providers' failure to compensate North County violates § 201(b), we conclude that "the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor*, 307 F.3d at 778. As a result, the dismissal of North County's claims should have been without prejudice to allow filing of the claim in the proper forum. *See Syntek Semiconductor*, 307 F.3d at 782; *see also Clark*, 523 F.3d at 1115.

IV. CONCLUSION

We hold that the district court did not abuse its discretion when it dismissed North County's declaratory judgment claims, because North County is unable to assert a federal claim. The district court lacked subject matter jurisdiction pursuant to the Declaratory Judgment Act, as North County cannot

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[13] It does not appear that the district court relied on the primary jurisdiction doctrine in dismissing North County's declaratory judgment claims, nor did North County request a stay of the proceedings. However, we may apply the doctrine *sua sponte*. *See Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 n.2 (9th Cir. 2002), *as amended*.

establish a private right to compensation under the provisions of the Federal Communications Act. The Commission has not determined that the CMRS providers' failure to pay compensation violates the Federal Communications Act. Because we are ill equipped to properly resolve North County's claim in the absence of a predicate determination from the Commission, we vacate the judgment and remand this case so that North County's claims can be dismissed without prejudice.

VACATED and REMANDED for dismissal without prejudice.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 06CV1542-LAB (RBB)

[Filed November 26, 2007]

NORTH COUNTY COMMUNICATIONS CORP.,	)
Plaintiff,	)
vs.	)
CALIFORNIA CATALOG & TECHNOLOGY dba, CCT TELECOMMS (OCN 573B), et al.,	)
Defendants.	)

ORDER GRANTING MOTIONS TO DISMISS

[Dkt Nos. 138, 139, 144]

Plaintiff North County Communications Corp. ("NCC") represents it is a Competitive Local Exchange Carrier ("CLEC") providing telecommunications services throughout California pursuant to the Federal Communications Act of 1934 and the

Telecommunications Act of 1996. Dkt No. 137 ¶ 1, Third Amended Complaint ("TAC"). NCC seeks declaratory relief, quantum meruit recovery, and enforcement of tariff compensation against approximately fifty named defendants it alleges are Commercial Mobile Radio Service ("CMRS") providers or CLECs under those same Acts. TAC ¶ 2. NCC contends it is entitled to recover its costs to deliver wireless telephone calls initiated by defendants' customers and placed to NCC's customers as traffic sent through NCC's system without any interconnection agreement or reciprocal compensation arrangement.

This matter is before the court on the Motion To Dismiss TAC for failure to state a claim filed by defendants Cal-One Cellular, L.P. and Cellco Partnership (collectively "Verizon Wireless"), joined by defendant Phoneco, L,P., and the Motion To Dismiss TAC for lack of subject matter jurisdiction and for failure to state a claim filed by defendants T-Mobile USA, Inc., Cingular Wireless, and Cricket Communications, Inc. (collectively "T-Mobile").[1] NCC filed an Opposition, and each set of moving parties filed a Reply. Pursuant to Civil Local Rule 7.1(d)(1), the court finds the issues presented appropriate for decision on the papers and without oral argument. For

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[1] In their April 10, 2007 Motion, these defendants noted Cricket was named in the First Amended Complaint, but not in the caption or the body of the Third Amended complaint, and request dismissal of Cricket from the case. Dkt No. 144 p. 1 n.2. However, by Joint Motion filed May 18, 2007, the parties stipulated "Leap Wireless Intl., Inc. dba Cricket Comm., Inc." should be added as a named defendant, and the court so ordered on May 22, 2007. Dkt Nos. 151, 152.

the reasons discussed below, the Motions are **GRANTED**.

I. BACKGROUND

A. Factual Background

As summarized in the Order dismissing NCC's FAC with leave to amend: "This case concerns the ability of LECs to obtain compensation from CMRS providers for indirectly routed calls in the absence of a negotiated agreement as contemplated by 47 C.F.R. § 20.11." Dkt No. 124, 2:13-25. NCC describes itself as a CLEC providing switched and non-switched local exchange, exchange access, and other telecommunications services to end users in California. TAC ¶ 3. As a CLEC common carrier, NCC has a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. . . ." 47 U.S.C. § 251(a)(1); *see* 47 C.F.R. § 20.11(b)[2] (even without negotiated reciprocal compensation arrangements for the transport and termination of telecommunications, the rules require CMRS (wireless) providers be given the opportunity to

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[2] 47 C.F.R. § 20.11(b)(2) provides: "A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider." Following the T-Mobile Decision, that rule was amended to add § 20.11(d): "Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." The obligations under § 20.11 may be enforced by filing a complaint with the FCC under section 208 of the Act. 47 C.F.R. § 20.11(a).

interconnect with LECs like NCC). The named defendants are providers offering their customers calling plans into areas NCC services. NCC terminates calls from defendants' customers to its end users and incurs associated costs. TAC ¶¶ 4-7.

The NCC alleges it sent monthly bills to the defendants for its traffic termination costs beginning in January 2003 at rates consistent with its state termination tariff rates, but defendants have refused to pay the charges. NCC contends it must be permitted to recover its costs for the transport and termination of local telecommunication traffic originating from other parties' networks. TAC ¶¶ 9-12; *see* 47 C.F.R. § 20.11(b)(2) ("A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider"). NCC alleges defendants refuse to pay the billed charges, refuse to pay NCC reasonable reciprocal compensation, and have not entered interconnection agreements or reciprocal compensation arrangements for routing communications traffic through NCC's system. TAC ¶¶ 11-13, 16.

NCC pursues this action based on its interpretation of the February 24, 2005 decision in T-Mobile USA, Inc. Petition For Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs, FCC Docket Nos. 01-92, 95-185, 96-98 ("T-Mobile Decision"), the April 29, 2005 effective date of amendments to 47 C.F.R. § 20.11 promulgated by the T-Mobile Decision, and NCC's contention it can and must turn to this court for relief from "the Defendants' unjust and unreasonable

practices," in consideration of "the FCC"s unwillingness to entertain 'collection actions' such as this, the impropriety of Plaintiff blocking incoming calls from carriers who refuse to pay for services they have utilized, and the Defendants' continuing practice of sending traffic which places an undue burden on Plaintiff's system and refusing to pay for this traffic." TAC ¶ 25. However, as argued by the moving defendants, and as the Order dismissing the FAC indicates, the FCC's T-Mobile Decision "did not address whether or how ILECs could pursue claims for enforcement of tariffs in place before April 28, 2005, or even *if* ILECs could pursue such claims." Dkt No. 144, 6:16-18.

In addition to disputing whether CLEC's can obtain compensation from CMRS providers for indirectly routed calls in the absence of a negotiated agreement, the Motions assert a jurisdictional bar to this court's power to adjudicate the dispute, contending the TAC has not demonstrated federal subject matter jurisdiction. The court decides the Motions on the jurisdictional issue.

B. Procedural Background

As pertinent here, NCC's First Amended Complaint ("FAC") named approximately 82 defendants and presented three causes of action: an Enforcement of Tariff claim under the Communications Act of 1934, 47 U.S.C. §§ 206, 207; a Declaratory Relief claim under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a); and a quantum meruit claim pursuant to the California Public Utilities Code § 737 and California common law. Chief Judge Irma E. Gonzalez, to whom this case was then assigned,

entered a February 16, 2007 Order granting defendants' Motion To Dismiss First Amended Complaint for failure to state a claim and for failure to allege a cognizable legal theory in support of the court's exercise of jurisdiction, with leave to amend. Judge Gonzalez rejected NCC's argument the T-Mobile Decision established its right to pursue compensation by way of tariff, as well as its argument defendants' practice of refusing to pay compensation is an "unjust or unreasonable" practice made unlawful pursuant to 47 U.S.C. § 201(b) authorizing NCC to seek damages pursuant to 27 U.S.C. § 206. In opposition to dismissal, NCC had alternatively argued it could amend its complaint to state a claim under 47 U.S.C. § 251(b)(5). Although the court expressed reservations about NCC's ability to do so, the court granted NCC leave to amend, relying on its insistence its claims arise under federal law, in particular provisions of the Federal Communications Act and regulations as well as the Declaratory Judgment Act, even though the FAC had failed to allege a legally cognizable federal claim. Dkt No. 124 p. 12.

The undersigned District Judge received the reassignment of this case following Judge Gonzalez's recusal on March 7, 2007. NCC filed its Second Amended Complaint on March 19, 2007, continuing to name a host of entity defendants, a number of whom the docket reflected NCC previously had voluntarily dismissed. This court ordered NCC to "serve and file a superseding Third Amended Complaint to conform the parties and allegations to the claims and defendants plaintiff will actually be pursuing in the current posture of this litigation." Dkt No. 135. NCC filed its TAC on March 21, 2007, asserting the same three causes of action as in its First Amended Complaint,

but in a different order. The named defendants continue to number in the dozens. The same two groups of defendants (*i.e.*, the two Verizon Wireless defendants and the three T-Mobile defendants) who had successfully moved to dismiss the FAC move separately again to dismiss the TAC for failure to state a claim and for lack of federal subject matter jurisdiction.

II. DISCUSSION

A. Legal Standards

1. Rule 12(b)(1)

A federal court cannot reach the merits of any dispute until it confirms its own power to adjudicate the case. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-95 (1998). An affirmative defense that the court lacks subject matter jurisdiction may be raised by a motion to dismiss. Rule 12(b)(1). A Rule 12(b)(1) Motion challenges the court's power to hear the case. Morongo Band of Mission Indians v. California State Bd. Of Equalization, 858 F.2d 1376, 1380-81 (9th Cir. 1988). A facial attack on subject matter jurisdiction relies on the allegations in the complaint, documents attached to the complaint, judicially noticed facts, and any undisputed facts evidenced in the record. If it appears from the face of the complaint federal jurisdiction is lacking, dismissal is proper on a Rule 12(b)(1) motion. *See* Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). The plaintiff has the burden to demonstrate jurisdiction exists in order for a complaint to survive a 12(b)(1) challenge. Tosco Corp. v. Communities For A Better Environment, 236 F.3d

495, 499 (9th Cir. 2001) ("A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendments"), *quoting* Smith v. McCullough, 270 U.S. 456 (1926) *and citing* Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989); Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (the burden to establish the existence of federal subject matter jurisdiction lies with the party invoking it).

The complaint allegations control whether a suit "arises under" federal law for purposes of 28 U.S.C. Section 1331. "Where the complaint . . . seeks recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." U.S. v. Morros, 268 F.3d 695, 699-700 (9th Cir. 2001). "After construing the allegations in the light most favorable to the plaintiff, a complaint will be dismissed for lack of subject matter jurisdiction if: (1) the claim does not 'arise under' federal law or the Constitution; (2) there is no case or controversy; or (3) the cause of action is not described in any jurisdictional statute." Doe v. Schachter, 804 F. Supp. 53, 57 (N.D.Cal 1992), *citing* Baker v. Carr, 369 U.S. 186, 198 (1962).

2. Rule 12(b)(6)

A Rule12(b)(6) motion tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc.,749 F.2d 530, 534 (9th

Cir. 1984); *see* Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534; *see* Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

3. Declaratory Judgment Act

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides no independent basis to confer federal subject matter jurisdiction. *See* Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1161-62 (9th Cir. 2005). Accordingly, a plaintiff invoking federal jurisdiction must plead some other affirmative claim arising under federal law as an independent basis to vest jurisdiction in the district court to adjudicate the matter. Id. Moreover, unless the requested declaratory relief would aid in clarifying and settling the parties' legal relations and terminate the proceedings between them with relief from uncertainty and ambiguity, it should be denied.[3] See, e.g., Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F,2d 1103 (9th Cir. 1987). The court exercises its discretion in deciding whether to entertain or grant a request for declaratory judgment. Id.

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[3] As the T-Mobile defendants note, NCC's own pleading acknowledges neither of those objectives would be achieved by a declaratory judgment from this court, because the appropriate regulatory body would still have to determine the precise rate of compensation for termination of traffic, among other things. *See* Dkt No. 144 15:26-16:16, TAC ¶ 30.

4. The T-Mobile Decision

In the T-Mobile Decision, decided April 28, 2005, CMRS providers jointly filed a petition for a declaratory ruling asking the FCC to reaffirm "that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic," arguing, among other things, the tariffs were unlawful because they bypassed codified negotiation and arbitration procedures. T-Mobile Decision ¶ 1. The FCC found "the existing rules do not explicitly preclude tariffed compensation arrangements" and therefore "incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obliged to accept the terms of applicable state tariffs."[4] T-Mobile Decision ¶ 9.

However, the FCC further found "neither the Commission's reciprocal compensation rules, nor the § 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the types of arrangements that trigger a compensation obligation." T-Mobile Decision

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[4] "Incumbent" LECs are defined by statute: "(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that -- (A) on February 8, 1996, provided telephone exchange service in such area; and (B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 659.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i)." 47 U.S.C. § 251(h). That section also contains a provision describing in what circumstances the Commission "may, by rule" provide for the treatment of an LEC as an incumbent local exchange carrier, 47 U.S.C. § 251(h)(2).

¶ 9. As summarized in Judge Gonzalez's Order: "Although the Commission found the prior use of termination tariffs permissible, it amended § 20.11 prospectively 'to prohibit LECs from imposing compensation for obligations for non-access traffic pursuant to tariff,' . . . [and] to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in § 252 of the Act." Dkt No. 124 6:26-7:5, *quoting* T-Mobile Decision ¶ 16.

5. Law Of The Case Doctrine

Under the law of the case doctrine, courts follow prior decisions in subsequent proceedings in the same case. *See* Eichman v. Fotomat Corp., 880 F.2d 149, 157 (9th Cir.1989); *see also* United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) ("Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case' "), *quoting* Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993). A prior Order issued in the same case triggers the law of the case doctrine. "The doctrine of law of the case encompasses a court's explicit decisions as well as those issues decided by necessary implications." Alexander, 106 F.3d at 876 (quotation marks and citation omitted). The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. *See* Arizona v. California, 460 U.S. 605, 618 (1983).

> Although the observance of the doctrine is considered discretionary, this court has ruled that the prior decision should be followed unless: (1) the decision is clearly erroneous and

> its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.

In re Rainbow Magazine, Inc., 77 F.3d 278, 281-82 (9th Cir. 1996), *quoting* Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir.1995).

This court finds none of the circumstances here warrant deviation from law of the case doctrine. The court addresses the instant Motions in consideration of the findings and rulings associated with Judge Gonzalez's dismissal of the FAC. Unless the TAC cures the FAC defects Judge Gonzalez identified, the result must be the same.

B. Motions Merits

1. NCC Has Not Established Federal Subject Matter Jurisdiction

NCC contends this court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 "because the Plaintiff's claims arise under federal law," and the "claims involve[] substantial questions of federal law which implicate broad federal interests which cannot be resolved without reference to the Federal Communications Act of 1934 and the Telecommunications Act of 1996." TAC ¶ 26. "In particular, relief is sought by way of 28 U.S.C. § 2201 and 2202, 47 U.S.C. §[§] 201, 202, 206, 207, 251, and

401,[5] as well as involving the application of various orders and regulations issued by the Federal Communications Commission." TAC ¶ 26.

Only the TAC's First Cause of Action for declaratory relief purports to rely on federal law, seeking a judicial determination whether NCC is entitled to compensation for terminating calls sent to its end users by Defendants' customers after the date of the T-Mobile Decision. Applying law of the case doctrine to the claim as rearticulated after dismissal of the FAC, this court considers the following principles and prior findings in deciding the Motions:

a. "The DJA [Declaratory Judgment Act, 28 U.S.C. § 2201(a)] provides relief only where there is 'an affirmative claim arising under federal law in order to vest the district court with jurisdiction." Dkt No. 124 10:24-26, *quoting* California v. Oroville-Wyandotte Irrigation Dist., 409 F.2d 532, 535 (9th Cir.1969). "[N]either 47 U.S.C. § 206, nor 47 U.S.C. § 201, provides a private cause of action for violation of a regulation." Dkt No. 124 11:1-3.

b. Unless NCC cites a "federal statute as an underlying basis for the Court's jurisdiction," the DJA offers no independent basis for the exercise of federal

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[5] The court finds NCC's reliance on 47 U.S.C. § 401 to be unelaborated and misplaced as a basis for this court's exercise of jurisdiction. As Defendants observe, 47 U.S.C. § 401, by its express terms, is limited to parties seeking injunctive relief to enforce an FCC order. Through its TAC, NCC seeks only compensatory damages, declaratory relief, fees, and costs. Section 401 provides no mechanism for obtaining either a judicial declaration or damages.

jurisdiction. Dkt No. 124 10:20-24 (noting NCC had conceded the FAC cited no federal statute as required to provide an underlying basis for this court's jurisdiction).

c. Unless NCC "identifie[s] an independent basis for federal court jurisdiction over its claim for compensation for termination of calls by Defendants' customers," its cause of action under the Declaratory Judgment Act must be dismissed for lack of jurisdiction. Dkt No. 124, 11:4-7, *citing* Libertore, 408 F.3d at 1161.

d. The provisions of 47 U.S.C. §§ 206-207 do not provide an independent basis for a private right of action, *unless* some *other* statutory provision within the same chapter has been violated. Dkt no. 124, pp. 8, 11, *citing* Greene v. Sprint Communications Co., 340 F.3d 1047, 1048-49 (9th Cir. 2003).

e. The provisions of 47 U.S.C. § 201(b) do not provide an independent basis for a private right of action on the premise regulatory violations necessarily give rise to claims thereunder. Only in narrow circumstances, previously found to be not present in this case, will the violation of an FCC regulation support a private right of action for damages thereunder, such as when the FCC has expressly determined in its implementing order a particular rules violation constitutes a Section 201(b) violation enforceable through a private court action. Dkt No. 124, pp. 8-9; *see* Metrophones Telecommunications, inc. v. Global Crossing Telecommunications, Inc., 423 F.3d 1056, 1064-70 (9th Cir. 2005).

Referring to the "red-lined" comparison of the FAC to the TAC,[6] the court observes the Declaratory Relief cause of action in the FAC asked the court to determine:

> (1) the number of calls and the numbe[illegible] of minutes originating on the Defendants' networks and terminated on the Plaintiffs network from April [2]9, 2005 up through the time of trial; (2) that the Plaintiff is entitled to receive mutual compensation for the termination of call[illegible] to Plaintiffs end-users which originate on the Defendants' networks, and (3) that the defendants are required to commit to compensate Plaintiff at a rate to be determined by the appropriate regulatory body, or else refrain from sending any traffic to Plaintiff's end-users and refrain from taxing Plaintiffs limited resources.

Dkt No. 144-4, p. 9.

The TAC restatement of the Declaratory Relief claim merely adds the assertion: "(4) that the Defendants' conduct amounts to an unjust and unreasonable practice in violation of **sections 201 and 202** of the Federal Communications Act (47 U.S.C. § 201, 202) which has damaged the Plaintiff (47 U.S.C. §§ 206, 207)." Dkt No. 144-4, p. 10.

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[6] The red-lined comparison of the FAC pleading and the TAC pleading is provided as Dkt No. 144-4, T-Mobile's Amended Motion To Dismiss, without objection from NCC.

Judge Gonzalez rejected NCC's argument the T-Mobile Decision established its right to pursue compensation by way of tariff as well as its argument defendants' practice of refusing to pay compensation is an "unjust or unreasonable" practice made unlawful pursuant to 47 U.S.C. § 201(b) authorizing NCC to seek damages in federal court pursuant to 27 U.S.C. § 206. She granted leave to amend based on NCC's representation it could amend its Complaint to state a Declaratory Relief claim **under 47 U.S.C. § 251(b)(5)**, a contention she found dubious.[7] That is not what NCC has attempted to do in the one federal TAC cause of action, continuing instead to rely on 47 U.S.C. §§ 201, 202. The TAC does no more than string cite the statutory provisions in its Jurisdictional Statement And Venue section, summarily contending the court purportedly has subject matter jurisdiction over this action under 28 U.S.C. § 1331 because the Plaintiff's claims arise under federal law: "In particular, relief is

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[7] Judge Gonzalez was skeptical of the NCC's ability to state such a claim. She opined any attempt to amend the complaint to add a claim under 47 U.S.C. § 251(b)(5), based upon the state tariff, would be "futile" because "Section 251(b)(5) does not establish a right to compensation for the termination of traffic" but rather "requires LECs to enter into arrangements for reciprocal compensation." Dkt No. 124 9:16-10:1, *citing* 47 U.S.C. § 153(26); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCCR 15499, FCC 96-325, First Report and Order ("Local Competition First) ¶ 1004. "Under the Act and its regulations, CMRS providers are not LECs and do not have the same obligations imposed upon LECs," and "there is nothing in the Act, the regulations, or the Commissioner's reports indicating an intent by Congress or the FCC to allow LECs to enforce a duty of reciprocal compensation against CMRS providers pursuant to § 251(b)(5)." Dkt No. 124 10:1-7.

sought by way of 28 U.S.C. §§ 2201 and 2202, 47 U.S.C. §[§] 201, 202, 206, 207, 251, and 401." The TAC does not actually plead an expanded claim under 47 U.S.C. § 251. TAC ¶ 26; Dkt No. 144-4 pp. 8-9.

On the issue of "reciprocal compensation," 47 U.S.C. § 251 establishes no right to sue in federal court for such recoveries, but rather imposes a duty on the carriers as among themselves "*to establish* reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5) (emphasis added). Those arrangements, if breached, may give rise to standing to sue, but in the *absence* of any such arrangement, NCC has not convinced the court it can exercise original jurisdiction over NCC's TAC claims. The TAC Prayer for relief continues to cite only 47 U.S.C. §§ 201, 202 as the basis for its allegation "the Defendants' conduct amounts to an unjust and unreasonable practice" in violation of those provisions of the Federal Communications Act and a damages statement Judge Gonzalez has already ruled do not support federal jurisdiction over this action. The NCC has not identified authority conferring federal jurisdiction over this dispute. This is not a case where NCC is suing for breach of the duty imposed by 47 U.S.C. § 251(b)(5) *to establish* a reciprocal compensation arrangement (irrespective of whether such a claim would even be cognizable here), but rather NCC sues for damages and a declaration of "rights and responsibilities" it appears to this court have not been rendered sufficiently concrete to afford meaningful declaratory relief.

NCC's two other TAC claims arise solely under state law. The Second Cause of Action seeks a

quantum meruit recovery of the reasonable value of the services NCC provided as a benefit to Defendants by terminating calls originating on their networks for the period April 29, 2005 through the time of trial. Judge Gonzalez previously adjudged the quantum meruit compensation for termination of traffic from the date of the T-Mobile Decision forward to be based solely on state law,[8] but with leave to amend to attempt to reallege the quantum meruit claim under 47 U.S.C. § 201(b). Dkt No. 124, 11:14. She determined the Ninth Circuit has held neither 47 U.S.C. § 206 nor 47 U.S.C. § 201 provides a private cause of action for violation of a regulation. Dkt No. 124, 11:1-3. Comparing the FAC and the TAC, the court finds the NCC has not successfully restated its quantum meruit claim as one arising under federal law, and it remains a state law issue.

The Third Cause of Action seeks enforcement of a California tariff as the alleged recovery measure for the period beginning three years before the filing of the Complaint in this action and continuing up to and including April 28, 2005. TAC ¶ 41. Applying the law of the case, in order to find the TAC pleading has

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[8] The T-Mobile Decision ended any uncertainty regarding whether compensation obligations could exist between CMRS providers and incumbent LECs that had not entered agreements establishing such obligations by ruling, from the February 2005 date of that decision forward, compensation obligations can be established only by agreement. T-Mobile Decision, ¶¶ 14, 16. That decision also expressly adopted a new rules under 47 C.F.R. § 20.11(d) (providing LECs "may not impose compensation obligations for traffic . . . pursuant to tariffs") and (e) (providing for the invocation of the negotiation and arbitration procedures contained in section 252 of the Act in circumstances where an incumbent LEC requests interconnection from a CMRS provider).

cured the defects Judge Gonzalez identified, NCC would have to have incorporated some other provision of federal law permitting it to enforce the state tariff in federal court, as 47 C.F.R. § 20.11(b)(2) does not identify a mechanism for entities like NCC to obtain compensation, and 47 U.S.C. §§ 206, 207 do not support a claim for enforcement of a state tariff. The court relies on the following principles and prior findings to conclude NCC has not cured its pleading defects:

a. In its T-Mobile Decision, the FCC explicitly disallowed prospectively the practice of LEC's seeking compensation from CMRS providers pursuant to tariff, so that NCC's causes of action for compensation for any period after the T-Mobile Decision must rely on the Declaratory Judgment Act and common law quantum meruit. Dkt No. 124 3:22-25.

b. "Even assuming the T-Mobile Decision authorized Plaintiff to file its state wireless termination tariff, Plaintiff's FAC cites no statute or other provisions of federal law permitting Plaintiff to file an action in federal court to enforce the state tariff," and NCC's opposition to the motions to dismiss the FAC "implicitly concede[d] the T-Mobile Decision does not independently permit an action for enforcement of the state tariff to be brought in federal court." Dkt No. 124 7:7-11.

c. NCC's asserted 47 U.S.C. § 206 statutory basis for its contention defendants' failure to compensate it for the termination of traffic is an "unlawful practice" for which it may recover damages in this court cannot be based "solely upon the T-Mobile Decision or the regulations" because the Ninth Circuit has held

"sections 206 and 207 authorize a private cause of action in federal court *only* for violation of some provision of the statutes contained within that chapter, and not for any violation of FCC's regulations." Dkt No. 124 7:18-8:7, *citing* Greene v. Sprint Communications Co., 340 F.3d 1047, 1048-49 (9th Cir. 2003).

d. The tariff NCC attempts to enforce in this case "is a purely state tariff," not one set and filed with the FCC. A cause of action directly under sections 206 and 207 is not authorized because those provisions apply only to enforcement of an existing FCC-approved tariff. Dkt No. 124 8:8-13.

e. In amending its complaint, Judge Gonzalez informed the NCC it had to point to something other than its own argument that the failure of CMRS providers to pay compensation as provided for in 47 C.F.R. § 20.11(b) is an "unjust and unreasonable" practice within the meaning of § 201(b) of the Act, the T-Mobile Decision and its state tariff are not a sufficient basis to state a cause of action under § 201(b) because "the Ninth Circuit in Metrophones rejected the Commissioner's argument that the violation of a regulation automatically created a private cause of action."[9] Dkt No. 124 9:7-15.

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[9] "The plaintiff in Metrophones alleged the providers' failure to compensate payphone providers for dial-around calls violated 47 C.F.R. § 60.1300, which provides '. . . a Completing carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Competing carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by contract.' The language of § 60.1300 is similar to the language of 47 C.F.R. § 20.11, which establishes

f. NCC's tariff cause of action "point[s] to nothing in the Communications Act entitling it to collect compensation in federal court based upon those [state wireless termination tariffs] according to the allegations in the FAC," causing a failure to state a cognizable legal theory arising under federal law on that basis. Dkt No. 124 10:8-12.

The court finds the differences between the pleading of the causes of action in the FAC and in the TAC fail to cure the defects identified by Judge Gonzalez, depriving this court of subject matter jurisdiction over this dispute. NCC has not demonstrated any claim "arises under" the laws or Constitution of the United States, and law of the case principles dictate dismissal is warranted. The court further finds on the facts and in the circumstances of this case declaratory judgment of the kind the NCC requests would not achieve the objectives of granting such relief. *See* Zolin, 812 F.2d 103.

2. Other Issues Raised

The court declines to address issues associated with proper parties to this dispute, including requests to dismiss unserved defendants, because the case does not survive the jurisdictional grounds for dismissal. Similarly, the court does not reach Verizon Wireless' preemption argument with respect to NCC's quantum meruit theory.[10]

LECs and CMRS providers' duty to enter into mutual compensation agreements." Dkt No. 124 p. 9 n.6.

[10] Judge Gonzalez expressly declined to reach Verizon's arguments NCC's claim for compensation by way of state tariff is preempted

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS HEREBY ORDERED** the Motions are **GRANTED** and the case is dismissed in its entirety.

IT IS SO ORDERED.

DATED: November 26, 2007

/s/
HONORABLE LARRY ALAN BURNS
United States District Judge

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by Federal law and that NCC's tariff does not apply to CMRS providers on grounds she found NCC failed to state a cognizable federal claim. "If Plaintiff can amend its complaint to state a claim, Movants can renew their arguments at that time." Dkt No. 124 10:14-18.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 06cv1542-IEG(RBB)

[Filed February 16, 2007]

NORTH COUNTY COMMUNICATIONS CORP.,	)
Plaintiff,	)
vs.	)
CALIFORNIA CATALOG & TECHNOLOGY dba CCT TELECOMMS (OCN 573B), *et al.*,	)
Defendants.	)

Order Granting Defendants' Motions to Dismiss with Leave to Amend [Doc. Nos. 39 and 40]

Defendants Cal-One Cellular, L.P. and Cellco Partnership (collectively "Verizon Wireless") and Defendants T-Mobile USA, Inc. ("T-Mobile"), Cingular Wireless ("Cingular"), and Cricket Communications, Inc. ("Cricket") (collectively "T-Mobile Movants") move to dismiss Plaintiff's First Amended Complaint

("FAC") pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Plaintiff has filed an opposition and Movants have filed reply briefs.

A hearing was held before Chief Judge Irma E. Gonzalez on February 12, 2007. Joseph Dicks and Steven Tucci appeared on behalf of Plaintiff. Philip Schenkenberg and Michelle Herrera appeared on behalf of the Verizon Wireless Movants. Suzanne Toller and Nathan Hamler appeared on behalf of the T-Mobile Movants. Upon consideration, for the reasons set forth herein, Defendants' motions to dismiss are GRANTED and Plaintiff is granted leave to amend. The parties' alternative motions to stay are DENIED at this time.

Background

Telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." 47 U.S.C. § 251(a)(1). In addition, certain carriers, known as local exchange carriers ("LECs")[1], have a duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Commercial mobile radio service ("CMRS") providers, commonly known as wireless carriers, must be given the opportunity to interconnect with LECs. 47 C.F.R. § 20.11(a). Compensation for traffic exchanged between LECs and CMRS providers is to be negotiated pursuant to the principles of mutual

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[1] A "local exchange carrier" ("LEC") is defined in the Act as "any person engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26).

compensation. 47 C.F.R. § 20.11(b). "A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider." 47 C.F.R. § 20.11(b)(2).

This case concerns the ability of LECs to obtain compensation from CMRS providers for indirectly routed calls in the absence of a negotiated agreement as contemplated by 47 C.F.R. § 20.11. Plaintiff is a competitive local exchange carrier ("CLEC") providing telecommunications services in California under the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. §§ 151 *et seq*. [FAC, ¶ 4.][2] The Movants, like many of the Defendants in this case[3], are CMRS providers. CMRS providers are not considered to be LECs. 47 U.S.C. § 153(26).

CMRS providers typically interconnect indirectly with smaller LECs via a Bell Operating Company ("BOC") tandem. The CMRS provider delivers the call to a BOC tandem, which in turn delivers the call to the

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[2] Local exchange carriers which provided telephone service in a defined area as of the date of the Act are referred to as *incumbent* local exchange carrier ("ILEC"). 47 U.S.C. § 251(h)(1). ILECs traditionally have a competitive advantage over companies wishing to enter into the business of providing telecommunications services. As a result, Congress put in place measures requiring ILECs to negotiate and enter into interconnection and compensation agreements. 47 U.S.C. § 251(c) ("Additional obligations of incumbent local exchange carriers.")

[3] It appears from Plaintiff's papers some of the Defendants are also LECs. Of the 82 original Defendants, nearly half have been dismissed.

terminating LEC. "The indirect nature of the interconnection enables the CMRS provider and LEC to exchange traffic even if there is no interconnection agreement or other compensation arrangement between the parties." [*T-Mobile USA, Inc. et al. Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs*, FCC Docket Nos. 01-92, 95-185, 96-98 ("*T-Mobile Decision*") (attached as Exhibit 1 to the T-Mobile Movants' Appendix), ¶ 5.]

By way of its FAC, Plaintiff seeks compensation for the costs of "terminating" calls originated by Movants' customers on Plaintiff's network. Plaintiff alleges the Movants and other Defendants offer calling plans allowing calls to areas serviced by Plaintiff, Plaintiff incurs costs in terminating calls sent to its end users by the Movants' end users, and Movants have refused to pay those costs. [FAC, ¶¶ 9, 10, and 16.] Plaintiff alleges Movants have sent traffic through Plaintiff's system without entering into an interconnection agreement or reciprocal compensation arrangement. [FAC, ¶ 11.] Plaintiff alleges it has sent monthly bills to the Movants for traffic termination beginning in January 2003, at rates consistent with its state termination tariff rates, but Movants have refused to pay the charges. [FAC, ¶ 17.]

The FAC contains three causes of action: (1) for enforcement of Plaintiff's state tariff for the period from 3 years prior to the filing of the complaint through April 28, 2005 (the date of the *T-Mobile Decision*); (2) for declaratory relief and (3) for quantum meruit.

For its first cause of action, Plaintiff relies upon the *T-Mobile Decision*. [FAC, ¶ 19.] Plaintiff contends the FCC in the *T-Mobile Decision* found LECs like Plaintiff could, in the absence of an interconnection agreement or reciprocal compensation agreement, file state termination tariffs to obtain compensation for traffic sent to its end users that originates with CMRS providers. [FAC, ¶ 20.] In the *T-Mobile Decision*, the FCC explicitly disallowed prospectively the practice of LECs seeking compensation from CMRS providers pursuant to tariff. As a result, Plaintiff's second and third causes of action, for compensation for the period after the *T-Mobile Decision*, rely upon the Declaratory Judgment Act and common law quantum meruit.

Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits the dismissal of a complaint where the federal court lacks subject matter jurisdiction. "Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). The burden of establishing the existence of subject matter jurisdiction lies with the party seeking to invoke the Court's jurisdiction. Id. A complaint based upon federal question jurisdiction may be dismissed where (1) the claim does not "arise under" federal law or the Constitution; (2) there is no case or controversy; or (3) the cause of action is not described in any jurisdictional statute. Baker v. Carr, 369 U.S. 186, 198 (1962). Where the lack of jurisdiction is raised by way of a motion to dismiss, the court must presume the truth of the allegations in the complaint "'unless controverted by undisputed facts in the record.'" Warren v. Fox Family Worldwide, Inc., 328

F.3d 1136, 1139 (9th Cir. 2003) (quoting Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows the dismissal of a claim that fails to state a proper claim for relief. Dismissal is appropriate "if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-45 (1957). Dismissal is also appropriate if the complaint fails to allege a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). In considering a motion to dismiss, the court accepts as true the facts alleged in the complaint and construes such facts in the light most favorable to the nonmoving party. Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000).

Discussion

Plaintiff's complaint is brought pursuant to sections 206 and 207 of the Communications Act of 1934, 47 U.S.C. §§ 206 and 207. Plaintiff also seeks relief under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a). Finally, Plaintiff seeks relief pursuant to California Public Utilities Code § 737 as well as under California common law. [FAC, ¶ 1.]

(1) Plaintiff's First Cause of Action

The T-Mobile Movants argue Plaintiff has failed to identify a federal statute which would entitle it to compensation by way of state tariff as alleged in the first cause of action. The T-Mobile Movants argue neither the *T-Mobile Decision* nor the Act provide a basis for Plaintiff's claim. Movant Verizon Wireless

also asserts Plaintiff's first cause of action, based upon a state tariff, is preempted by federal law. Both Movants argue the first cause of action fails to state a claim upon which relief may be granted because the tariff does not apply to CMRS providers.

Plaintiff's first cause of action refers to no federal statute or regulation establishing it has a right to obtain compensation by way of tariff from CMRS providers such as Movants. In opposition to the motions to dismiss, Plaintiff argues the *T-Mobile Decision* establishes its right to pursue compensation by way of tariff, and Defendants' practice of refusing to pay compensation is an "unjust or unreasonable" practice, made unlawful pursuant to 47 U.S.C. §201(b). As a result, Plaintiff argues it may seek damages pursuant to 47 U.S.C. § 206. Alternatively, Plaintiff argues it could amend its complaint to state a claim under 47 U.S.C. § 251(b)(5).

A. The T-Mobile Decision

The FCC issued the *T-Mobile Decision* based upon a petition for declaratory ruling filed jointly by CMRS providers asking the Commission to reaffirm "that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic." [*T-Mobile Decision*, ¶ 1.] T-Mobile and the other CMRS providers argued the tariffs were unlawful because they bypass the negotiation and arbitration procedures established by section 251 and 252 of the Act and did not provide for reciprocal compensation to CMRS providers pursuant to 47 C.F.R. §§ 51.701 - 51.717.

By way of background for its *T-Mobile Decision*, the Commission explained the origination of the concept of mutual compensation for the exchange of traffic between LECs and CMRS providers. Pursuant to section 201(a) of the Act, prior to the 1996 amendments, the Commission adopted rules requiring mutual compensation for the exchange of traffic between LECs and CMRS providers. In particular, 47 C.F.R. § 20.11 "required the originating carrier, whether LEC or CMRS provider, to pay reasonable compensation to the terminating carrier in connection with traffic that terminates on the latter's network facilities." [*T-Mobile Decision*, ¶ 2.] Subsequent to the 1996 amendments, the Commission in its *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCCR 15499, FCC 96-325, First Report and Order ("*Local Competition First*"), determined LECs are obligated under § 251(b)(5) of the Act "to establish reciprocal compensation arrangements for the exchange of ... traffic between LECs and CMRS providers."[4] [Id., ¶ 3.]

"Athough section 251(b)(5) and the Commission's reciprocal compensation rules reference an 'arrangement' between LECs and other types of telecommunications carriers, including CMRS providers, they do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange

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[4] This reciprocal compensation obligation applies to traffic within the same Major Traffic Area ("MTA"), as opposed to interstate or intrastate access.

traffic without making prior arrangements with each other." [*T-Mobile Decision*, ¶ 4.] As a result of disputes between LECs and CMRS providers resulting from the uncertainty of what, if any, method of compensation was appropriate, many LECs had filed wireless termination tariffs with state commissions in an attempt to obtain compensation for traffic originating with CMRS providers. [Id., ¶ 7.]

In the *T-Mobile Decision*, the Commission found "the existing rules do not explicitly preclude tariffed compensation arrangements" and therefore "incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs." [*T-Mobile Decision*, ¶ 9.] The Commission found "neither the Commission's reciprocal compensation rules, nor the § 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the types of arrangements that trigger a compensation obligation." Prior to the 1996 Act "the Commission specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers." and "acknowledge that the intrastate portions of interconnection arrangements are sometimes filed in state tariffs." [Id., ¶ 10.]

The Commission found § 20.11 and its reciprocal compensation rules "do not preclude carriers from accepting alternative compensation arrangements." [Id., ¶ 11.] "By routing traffic to LECs in the absence of a request to establish reciprocal or mutual compensation, CMRS providers accept the terms of otherwise applicable state tariffs." As a result, "wireless termination tariffs do not violate a CMRS

provider's rights to reciprocal or mutual compensation under section 251(b)(5) and section 20.11 of the Commission's rules." [Id., ¶ 12.]

Although the Commission found the prior use of termination tariffs permissible, it amended § 20.11 prospectively "to prohibit LECs from imposing compensation for obligations for non-access traffic pursuant to tariff." To provide LECs with the ability to compel CMRS providers to negotiate reciprocal or mutual compensation agreements, the Commission also amended § 20.11 to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in § 252 of the Act. [Id., ¶ 16.]

Even assuming the *T-Mobile Decision* authorized Plaintiff to file its state wireless termination tariff, Plaintiff's FAC cites no statute or other provision of federal law permitting Plaintiff to file an action in federal court to enforce the state tariff. Plaintiff's opposition to the motions to dismiss implicitly concedes the *T-Mobile Decision* does not independently permit an action for enforcement of the state tariff to be brought in federal court. Plaintiff also acknowledges 47 C.F.R. § 20.11(b)(2)[5] does not specify

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[5] 47 C.F.R. § 20.11(b)(2) provides: "A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider." Following the *T-Mobile Decision*, that rule was amended to add § 20.11(d): "Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." The obligations under § 20.11 may be enforced by filing

a mechanism by which LECs may obtain compensation. [Plaintiff's Points and Authorities in Opposition ("Pltf. P&A"), p. 6.] However, Plaintiff asserts its tariff may be enforced in this Court under 47 U.S.C. § 206 and suggests the Court should alternatively grant it leave to amend its complaint to add a claim under 47 U.S.C. § 201(b) or § 251(b)(5).

B. Statutory Basis of Plaintiff's First Cause of Action

Plaintiff argues Defendants' failure to compensate it for the termination of traffic is an "unlawful practice" for which it may recover damages in this Court under 47 U.S.C. § 206. Section 206 provides in pertinent part as follows:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee . . . .

47 U.S.C. § 206. A party claiming damage may bring an action either before the Commissioner or in the district court. 47 U.S.C. § 207. The Ninth Circuit has

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a complaint with the FCC under section 208 of the Act. 47 C.F.R. § 20.11(a).

held, however, that sections 206 and 207 authorize a private cause of action in federal court *only* for violation of some provision of the statutes contained within that chapter, and not for any violation of the FCC's regulations. Greene v. Sprint Communications Co., 340 F.3d 1047, 1048-49 (9th Cir. 2003). As a result, Plaintiff cannot rely solely upon the *T-Mobile Decision* or the regulations to bring its action for compensation for the termination of wireless traffic.

In its opposition, Plaintiff argues the Ninth Circuit's decision in Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166 (9th Cir. 2002) authorizes a cause of action directly under §§ 206 and 207 to enforce an existing FCC-approved tariff. However, the tariff sought to be enforced in Brown was one set and filed with the FCC. The tariff Plaintiff attempts to enforce in this case, by contrast, was not set by or filed with the FCC, but is instead a purely state tariff. As a result, Brown does not support Plaintiff's claim under § 206 for enforcement of its state tariff.

Alternatively, Plaintiff seeks leave to amend to plead a claim under § 201(b) of the Act based upon Movants' failure to pay compensation. Section 201(b) provides in pertinent part as follows: "All charges, practices, classifications and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ." 47 U.S.C. § 201(b). The Ninth Circuit has held, however, that every violation of the Commission's rules does not give rise to a cause of action under § 201(b). Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., 423 F.3d 1056,

1071 (9th Cir. 2005). The Ninth Circuit clarified "Congress did not intend for every violation of a regulation to give rise to a private action for damages." Id.

In the Metrophones case, the Commission previously had found "[a] failure to pay [for dial-around calls] in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of section 201(b) of the Act." Metrophones, 423 F.3d at 1064. In addition, the Commission cited § 201, as well as several other sections of the Act, as authority for its initial enactment of the payphone regulations. Id. at 1065. The Ninth Circuit found the Commission's interpretation of its regulations, including the Commission's conclusion a violation of the regulation constituted an unjust and unreasonable practice within the meaning of § 201(b), to be a reasonable construction entitled to deference. Notably, the court commented "the Commission did *not* conclude that every violation of its regulations is an 'unjust and unreasonable' practice, nor does its interpretation necessarily mean that a violation of any other regulation is an 'unjust and unreasonable practice.'" Id. at 1069.

By contrast, the Plaintiff in its FAC and in opposition to the motions to dismiss has pointed to nothing, aside from its own argument, establishing that the failure of CMRS providers to pay compensation as provided for in 47 C.F.R. § 20.11(b) is an "unjust and unreasonable" practice within the meaning of § 201(b) of the Act. Plaintiff acknowledges the *T-Mobile Decision* "did not speak explicitly in terms of section 201(b)" but argues the FCC did

reference its plenary authority under § 201. However, the Ninth Circuit in Metrophones rejected the Commission's argument that the violation of a regulation automatically created a private cause of action.[6] Metrophones, 423 F.3d at 1071. As a result, it is doubtful Plaintiff can amend its complaint to state a cause of action under § 201(b) based upon the *T-Mobile Decision* and its state tariff.

Likewise, it appears any amendment by Plaintiff to add a claim under 47 U.S.C. § 251(b)(5), based upon the state tariff, would be futile. Section 251 provides in pertinent part as follows:

> **(b) Obligations of all local exchange carriers**
> Each local exchange carrier has the following duties:
>
> * * *
>
> **(5) Reciprocal compensation**
> The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

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[6] The plaintiff in Metrophones alleged the providers' failure to compensate payphone providers for dial-around calls violated 47 C.F.R. § 60.1300, which provides ". . . a Completing carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by contract." The language of § 60.1300 is similar to the language of 47 C.F.R. § 20.11, which establishes LECs and CMRS providers' duty to enter into mutual compensation agreements. See supra, fn.5.

47 U.S.C. § 251(b)(5) (underlining added). Section 251(b)(5) does not establish a right to compensation for the termination of traffic. Instead, § 251(b)(5) requires LECs to enter into arrangements for reciprocal compensation. Under the Act and its regulations, CMRS providers are not LECs and do not have the same obligations imposed upon LECs. 47 U.S.C. § 153(26); *Local Competition First*, ¶ 1004. Plaintiff in its opposition argues it must be given some opportunity to enforce the obligation imposed in § 251(b)(5) or such statute would be rendered a nullity. However, there is nothing in the Act, the regulations, or the Commission's reports indicating an intent by Congress or the FCC to allow LECs to enforce a duty of reciprocal compensation against CMRS providers pursuant to § 251(b)(5).

Although the *T-Mobile Decision* arguably[7] authorized Plaintiff to file its wireless termination tariffs with the California Public Utilities Commission, Plaintiff has pointed to nothing in the Communications Act entitling it to collect compensation in federal court based upon those tariffs according to the allegations set forth in the FAC. As a result, Plaintiff's first cause of action fails to state a cognizable legal theory arising under federal law.

C. Preemption and Failure to State a Claim

Defendant Verizon Wireless argues Plaintiff's claim for compensation by way of state tariff is preempted by

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[7] There is pending before the FCC a request for reconsideration asking the Commission to declare whether its decision applies to CLECs like Plaintiff.

Federal law. Movants also argue the Plaintiff's tariff does not apply to CMRS providers. Because Plaintiff has failed to state a cognizable federal claim, the Court declines at this time to reach the issue of preemption or interpret the state tariff. If Plaintiff can amend its complaint to state a claim, Movants can renew their arguments at that time.

(2) Plaintiff's Second Cause of Action

Plaintiff's second cause of action seeks declaratory relief that Plaintiff is entitled to compensation for terminating calls sent to its end users by Movants' end users after the date of the *T-Mobile Decision*. However, Plaintiff's FAC cites no federal statute as an underlying basis for the Court's jurisdiction, a point Plaintiff concedes. The Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201(a), does not provide an independent basis for federal jurisdiction. The DJA provides relief only where there is "an affirmative claim arising under federal law in order to vest the district court with jurisdiction." California v. Oroville-Wyandotte Irrigation Dist., 409 F.2d 532, 525 (9th Cir. 1969). As explained above with regard to Plaintiff's first cause of action, the Ninth Circuit has held neither 47 U.S.C. § 206, nor 47 U.S.C. § 201, provides a private cause of action for violation of a regulation.

Because Plaintiff has not identified an independent basis for federal court jurisdiction over its claim for compensation for the termination of calls by Defendants' customers, Plaintiff's second cause of action under the Declaratory Judgment Act is dismissed for lack of jurisdiction. Nationwide Mut.

Ins. Co. v. Liberatore, 408 F.3d 1158, 1161 (9th Cir. 2005).

(3) Plaintiff's Third Cause of Action

Plaintiff's third cause of action for quantum meruit seeks compensation for termination of traffic from the date of the *T-Mobile Decision* forward. The T-Mobile Movants argue the third cause of action must be dismissed because there is no federal claim allowing the Court to exercise its supplemental jurisdiction. The Verizon Movants also argue such claim is preempted by federal law and must be dismissed.

As alleged in the FAC, this claim is based solely on state law. Because the Plaintiff fails in its first and second causes of action to state a cognizable legal theory justifying exercise of the Court's jurisdiction, the Court lacks supplemental jurisdiction over Plaintiff's quantum meruit claim. At the time of the hearing, Plaintiff's counsel implied this claim could also be stated under § 201(b). The Court will grant Plaintiff leave to amend to clarify its quantum meruit claim.

Because the Court lacks jurisdiction over the third cause of action as it is currently pled, the Court again declines at this time to reach the question of whether Plaintiff's quantum meruit claim is preempted.

Request for Stay

Plaintiff seeks a stay of this action pending the Supreme Court's decision in the Metrophones case. Plaintiff argues the Supreme Court's decision in Metrophones may impact the Court's decision on the

pending motions to dismiss, and will impact Plaintiff's ability to amend its complaint to add a cause of action under § 201(b). Plaintiff also argues a stay is appropriate because it will allow the FCC an opportunity to act on the petition for reconsideration of the *T-Mobile Decision*.

Because the FAC does not state a claim for which relief may be granted, and fails to allege a cognizable legal theory in support of this Court's exercise of jurisdiction, the Court lacks jurisdiction to stay this action. Morongo Band, 858 F.2d at 1380.

Amendment

The Court will grant Plaintiff leave to amend. Movants argue the Court must dismiss the case without leave to amend because it lacks subject matter jurisdiction. However, "[w]hen the district court has jurisdiction over the action at the outset but the complaint inadequately alleges jurisdiction, the court may grant leave to amend the defective allegations." Morongo Band, 858 F.2d at 1381, n.3 (citing 28 U.S.C. § 1653 (1983)). Plaintiff's claims arise under federal law including provisions of the Federal Communications Act and its regulations, as well as the Declaratory Judgment Act. However, Plaintiff has failed to allege a legally cognizable claim arising under these provisions of federal law. As a result, the Court will grant Plaintiff leave to amend.

Conclusion

For the reasons set forth herein, the Court GRANTS the motions to dismiss of Defendants Cal-One Cellular, L.P. and Cellco Partnership [Doc.

No. 39] and Defendants T-Mobile USA, Inc., Cingular Wireless, and Cricket Communications, Inc. [Doc. No. 40.] pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). The Court DENIES Plaintiff's alternative request for a stay. The Court grants Plaintiff leave to file a Second Amended Complaint within 30 days of the filing of this Order.

IT IS SO ORDERED.

DATED: February 16, 2007

/s/ Irma E. Gonzalez
IRMA E. GONZALEZ, Chief Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-55048
D.C. No. CV-06-01542-LAB
Southern District of California,
San Diego

[Filed March 24, 2010]

NORTH COUNTY COMMUNICATIONS CORP.,

Plaintiff - Appellant,

v.

CALIFORNIA CATALOG & TECHNOLOGY, d/b/a CTT Telecomms (OCN 573B,

Defendant,

TGEC COMMUNICATIONS CO. LLC, CA (OCN 5969; et al.,

Defendants,

and

CELLCO PARTNERSHIP, d/b/a Verizon Wireless - CA (OCN 6006); CELLCO

PARTNERSHIP, d/b/a Verizon Wireless - NM (OCN 6573; et al.,

Defendants-Appellees.

ORDER

Before: RAWLINSON and N.R. SMITH, Circuit Judges, and WILKEN,* District Judge.

Judges Rawlinson and Smith voted, and Judge Wilken recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Petitioner's Petition for Rehearing En Banc filed on February 24, 2010, is DENIED.

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* The Honorable Claudia Wilken, U.S. District Judge for the Northern District of California, sitting by designation.

APPENDIX E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Communications Act of 1934, Title 47 of the United States Code, as amended, provides in relevant part:

Sec. 201. Service and charges

* * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful:...

* * *

Sec. 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the

court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

* * *

Sec. 251.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS - Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

* * *

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS-

Each local exchange carrier has the following duties:

* * *

(5) RECIPROCAL COMPENSATION- The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Title 47 of the Code of Federal Regulations provides in relevant part:

Sec. 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. . . . .

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall...be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
OCT 25 2010
OFFICE OF THE CLERK

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(2)

No. 10-257

IN THE
Supreme Court of the United States

NORTH COUNTY COMMUNICATIONS CORP.,
Petitioner,

v.

CELLCO PARTNERSHIP,
D/B/A/VERIZON WIRELESS-CA (OCN 6006), ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION FOR T-MOBILE USA, INC., CINGULAR WIRELESS, AND CRICKET COMMUNICATIONS, INC.

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October 25, 2010

PARTIES TO THE PROCEEDING

In addition to the parties named by the Petitioner, there were also a number of parties named as defendants in the lower court proceeding that did not appear or participate in the Ninth Circuit case:

California Catalog & Technology, d/b/a CTT Telecomms (OCN 573B), TGEC Communications Co. LLC, CA (OCN 5969); United States Cellular Corp - California, (OCN 6261); GTE Mobilnet of Tampa, Inc., (OCN 6339); Arch Wireless Holdings, Inc., (OCN 6630); El Dorado Cellular, d/b/a Mountain Cellular (OCN 6980); Brooks Fiber Properties, Inc., (OCN 7219); The Other Phone Company, Inc., (OCN 7452); Charter Fiberlink CA-CCO, LC, (OCN 776C); Firstworld So. CA, (OCN 7839); A+ Wireless Inc., d/b/a Advantage Wireless - CA (OCN 822A); Mpower Communications Corp - CA, (OCN 8322); Choice Telecomm, LLC - CA; Trans National Communications Intl, Inc. - CA (OCN 864C); Commpartners, LLC - CA (OCN 869C); Allegiance Telecom, Inc. - CA (OCN 8782; Onestar Communications, LLC - MD (OCN 9992); Integrated Communications Consultants, Inc. - CA (OCN 9397); NTCH - California, Inc. (OCN 9607); Telemex International - CA (OCN 998B); Bay Area Cellular Telephone; Pacific Centrex Services, Inc. - CA (OCN 3662); Bullseye Telecom, Inc. - CA (OCN 069A); Comm South Companies, Inc. - CA (OCN 400A); Arrival Communications, Inc. - CA (4553); BLUE Casa Communications LLC - CA (OCN 111B); Comcast Phone of California LLC - CA (OCN 7610); Communications Express, Inc., d/b/a Com Express; ECI Comms Inc., d/b/a ITS Network Services - CA

(OCN 3630); ER Nest Communications, Inc. - CA (OCN 4961); Excel Telecommunications, Inc. - CA (OCN 243A); Express Telephone Services, Inc. - CA (OCN 093A); Global Naps California, Inc. - CA (OCN 5300); In Touch Communications, Inc. - CA (OCN 047B); Lightyear Network Solutions, LLC - CA (OCN 5370); McGraw Communications, Inc. (OCN 5597); Metropolitan Telecomms California, d/b/a Mettel - CA (OCN 180A); PNG Telecomms d/b/a Powernet Global Comms CA (OCN 240B); Point Communications Corp - CA (OCN 2595); Preferred Carrier Services, Inc., d/b/a Phones For All (OCN 5428); Telephone Service Incorporated, d/b/a Friendlylec CA (OCN 2015); VCOM Solutions, Inc. - CA (OCN 334B); Wholesale Air-Time, Inc. - CA (OCN 199B); Blue Licenses Holding, LLC, (OCN 6010); Cal-One Cellular LP, (OCN 6604); Pacific Bell Mobile Services (OCN 6672)

CORPORATE DISCLOSURE STATEMENT

T-Mobile USA, Inc.: T-Mobile USA, Inc., a Delaware corporation, is a wholly-owned subsidiary of T-Mobile Global Holding GmbH, a German entity which, in turn, is a wholly-owned subsidiary of T-Mobile International AG, a German entity. T-Mobile International AG is a wholly-owned subsidiary of Deutsche Telekom AG, a German entity. Deutsche Telekom AG is a publicly-traded company. The American Depository Receipts of Deutsche Telekom AG are publicly traded in the United States. No other company owns 10% or more of T-Mobile USA, Inc.

Cingular Wireless: Cingular Wireless is owned by the following entities: (1) SBC Long Distance, LLC; (2) SBC Alloy Holdings, Inc.; (3) AT&T Mobility Corporation; (4) New Bell South Cingular Holdings, Inc; and (5) Bell South Mobile Data, Inc. None of these entities are publicly held or traded, however the ultimate corporate parent of all five entities is AT&T Inc., which is a publicly traded company, and there is no one person or group that owns 10% or more of the stock of AT&T Inc. In addition, Cingular Wireless LLC changed its names to AT&T Mobility LLC on January 8, 2007.

Cricket Communications, Inc.: Cricket Communications, Inc. is a wholly owned subsidiary of Leap Wireless International, Inc. Leap Wireless International, Inc. ("Leap") has issued stock that is publicly traded. Other than as indicated above, no publicly traded corporation owns more than 10% of the stock of Cricket Communications, Inc. ("Cricket"). To further enable the Court to evaluate possible conflict issues, Cricket states that, based solely on beneficial ownership information that has been filed with the Securities and Exchange Commission on Schedules 13D and 13G by beneficial owners of more than 5% of Leap common stock prior to the date hereof, Cricket believes that the following three entities have voting and investment power with respect to more than 10% of the total Leap stock outstanding: (i) entities affiliated with MHR Fund Management, LLC; (ii) entities affiliated with Harbinger Capital Partners Master Fund I, Ltd.; and (iii) T. Rowe Price Associates, Inc. Under the Federal Rules, Cricket is not required to and by this filing does not agree to undertake to supplement its

voluntary disclosure of beneficial owners of more than 10% of Leap common stock that are not publicly held by a corporation.

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INTRODUCTION

The instant Petition involves a dispute about whether Petitioner, a wireline telephone company (or "local exchange carrier"), is owed payments from Respondents, who are wireless carriers, because Petitioner has "terminated" telephone calls made by Respondents' customers to chat-lines and telemarketers served by Petitioner. The Petitioner's legal theory to support recovery is based on its allegation that Respondents violated 47 C.F.R. § 20.11(b) ("Rule 20.11") of the Federal Communications Commission ("FCC") rules and § 201(b) of the Communications Act of 1934 ("Communications Act"), which prohibits "unjust or unreasonable" practices. 47 U.S.C. § 201(b). Petitioner thus far, however, has failed to assert a legal theory under federal law that requires Respondents to pay compensation where there is no contractual obligation to make the requested payments.

More precisely, the central question presented by this Petition for a Writ of *Certiorari* ("Petition") is whether a private right of action for a violation of § 201(b) exists on the grounds that FCC Rule 20.11 has been violated, when § 201(b) does not expressly prohibit the alleged conduct and where the FCC has not found that a wireless carrier's failure to pay compensation in the absence of an agreement violates Rule 20.11 and § 201(b). Both the Southern District Court of California and the Ninth Circuit properly answered this question in the negative. *See* Pet. App. 1a and Pet. App. 30a. The Ninth Circuit

held that the district court "properly dismissed [Petitioner's] declaratory judgment claims, as [Petitioner] cannot demonstrate a right to compensation under any statute or regulation that is enforceable pursuant to a federal private right of action." Pet. App. 1a. In support, the Ninth Circuit noted that its opinion was "bolstered by the Supreme Court's recent decision in *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45 (2007)." Pet. App. 20a.

> [T]he Supreme Court limited its [*Global Crossing*] holding, as it did "not suggest that the FCC is required to find carriers' failures to divide revenues to be § 201(b) violations in every instance." *Id.* at 56. (citation omitted). "Nor [did it] suggest that every violation of FCC regulations is an unjust and unreasonable practice. . . . In contrast to the facts in *Global Crossing*, the [FCC] has not made any findings that CMRS providers' failure to compensate [competitive local exchange carriers] constitutes an unreasonable practice in violation of § 201(b). Because North County cannot demonstrate a violation of § 201(b) in the absence of an FCC determination, the district court properly dismissed North County's claims.

Pet. App. 22a-23a (citation omitted).

Petitioner now seeks review of the Ninth Circuit opinion, asserting that the appellate court improperly applied this Court's holding in *Global Crossing*. As discussed below, the Court found in *Global Crossing* that a private right of action existed

for a violation of a FCC rule where the FCC had explicitly determined that failing to comply with its rule violated § 201(b) of the Act. In this case, however, the Ninth Circuit correctly found that "the [FCC] has not determined that the CMRS providers' lack of payment to [competitive local exchange carriers] like North County violates § 201(b)." Pet. App. 19a. The Ninth Circuit opinion is thus consistent with this Court's precedent and does not present an important federal question that this Court must address.

STATEMENT OF THE CASE

Petitioner is a competitive telephone company, known as a competitive local exchange carrier ("CLEC") as opposed to an incumbent local exchange carrier ("ILEC"), which serves customers such as Internet Service Providers ("ISPs"), voice-mail companies, conference-lines, and 976 chat-line providers. Pet. at 2; *see also North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 F.C.C.R. 14036, 14037, ¶¶ 3-5 (2009). ("MetroPCS Order"). As a result, Petitioner mostly receives incoming calls to its network and these chat-line providers and conference-lines generally do not place out-bound calls to customers of other carriers. Respondents are wireless carriers, called commercial mobile radio service ("CMRS") providers. *See* 47 U.S.C. § 332(d)(1).

Petitioner claims that Respondents have refused to enter into agreements to pay Petitioner for receiving and "terminating" (delivering) telephone calls ("traffic") from Respondents' customers to Petitioner's end-users. Pet. at 3. Petitioner further

claims that Respondents' failure to pay Petitioner for terminating calls that Respondents' customers have made to Petitioner's customers violates federal law. Pet. at 3.[1]

The Act and the FCC's Rules

Congress created the regulatory classification of CMRS provider in the Omnibus Reconciliation Act of 1993.[2] The FCC, in implementing the Act, issued rules governing interconnection obligations that it had imposed in the mid-1980s on ILECs relative to cellular carriers and further extended those LEC obligations to all wireless carriers. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1497-98, ¶¶ 227-232 (1994). Rule 20.11(b) provides:

> (b) Local exchange carriers [LECs] and commercial mobile radio service providers "shall comply with principles of mutual compensation.

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[1] Petitioner makes a number of factual assertions in its Statement of the Case that Respondents do not agree with, including the following: (1) that Respondents have refused to enter into negotiations for a compensation agreement; (2) that all of the Respondents have received bills from Petitioner; (3) that Petitioner actually "terminates" these calls; (4) that Petitioner incurs costs for such termination; and (5) that Petitioner's billed rates are "even lower than those of some ILECs whose bills the CMRS providers do pay." *See* Pet. at 3-6. However, because this case was dismissed in response to a motion to dismiss the complaint, the assertions in the Petitioner's complaint were taken at face value by the courts below.

[2] Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

> (1) a [LEC] shall pay reasonable compensation to a [CMRS] provider in connection with terminating traffic that originates on facilities of the [LEC].
>
> (2) a [CMRS] provider shall pay reasonable compensation to a [LEC] in connection with terminating traffic that originates on the facilities of the [CMRS] provider.

47 C.F.R. § 20.11(b) (1994).

Two years following the adoption of Rule 20.11, Congress enacted the Telecommunications Act of 1996. In this statute, Congress required "each telecommunications carrier" to interconnect with other telecommunications carriers so that traffic may be exchanged between networks. *See* 47 U.S.C. § 251(a)(1). Congress further imposed on "each local exchange carrier" the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* at § 251(b)(5).

Congress further clarified that reciprocal compensation obligations applied only to LECs (wireline carriers) and not to CMRS providers. *See id.* at § 153(26) (CMRS providers are not LECs unless the FCC classifies them as LECs); *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, 15994, ¶¶ 1004-05 (1996) ("First Local Competition Order") ("We . . . decline at this time to treat CMRS providers as LECs. . . . Thus, until such time that we decide

otherwise, CMRS providers . . . are not subject to the obligations of section 251(b).")

A controversy arose nearly a decade later, because some LECs began billing CMRS providers for call termination without an agreement, pursuant to their State tariffs. The FCC found that "neither [its] reciprocal compensation rules, nor the section 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the type of arrangements that trigger a compensation obligation." *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* Declaratory Ruling and Report and Order, 20 F.C.C.R. 4855, 4860-61 at ¶ 10 (2005) ("T-Mobile Declaratory Ruling"). The FCC determined that "[g]oing forward . . . we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff." *Id.* at 4860, ¶ 9. The FCC therefore added paragraph (d) to its Rule 20.11:

> (d) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs. 47 C.F.R. § 20.11(d) (2005).

The NCC v. MetroPCS FCC Complaint Proceeding

In 2006, Petitioner filed a complaint with the FCC against one CMRS provider (MetroPCS, Inc.), alleging that MetroPCS' refusal to compensate Petitioner for call termination violated federal law.

In dismissing this cause of action, the FCC's Enforcement Bureau specifically stated that: "We make no determination at this time as to whether [R]ule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under [R]ule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of compensation." *North County Communications Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order, 24 F.C.C.R. 3807, 3814 n.55, (2009) ("MetroPCS Bureau Order").[3] Instead, the Bureau determined that Petitioner "should first obtain from the California Public Utilities Commission ("CPUC") a determination of a reasonable compensation rate." *Id.* at 3807, ¶ 2. The full FCC affirmed the Bureau's order on all grounds, but instead of dismissing the Rule 20.11 claim, the FCC held it in abeyance so that Petitioner may reinstate its complaint at the FCC to determine whether MetroPCS failed to pay reasonable compensation pursuant to Rule 20.11 after the CPUC determined the "reasonable rate" for compensation. *MetroPCS Order*, 24 F.C.C.R. at 14044-45 ¶22. This FCC order is currently pending on appeal. *See MetroPCS v. FCC*, No.10-1003 (D.C. Cir. filed Jan. 8, 2010).

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[3] The Bureau denied the claim that MetroPCS' refusal to enter into an agreement to pay compensation constituted an "unjust and unreasonable practice under section 201(b)," finding that the parties' inability to reach an agreement stemmed from "irreconcilable but *honestly* held beliefs rgarding the compensation rate, which, in turn, stem from *good faith* disagreements." *Id.* at 3815-16, ¶¶ 19-20 (emphasis in original).

The Litigation Below

This Petition arises from a lawsuit that Petitioner filed in 2006 in the United States District Court for the Southern District of California against Respondents, who are wireless carriers other than MetroPCS. Petitioner sought, among other things, a declaration that Respondents owe it for the termination of calls on Petitioner's network, and that failure to pay Petitioner for such termination violated the "unjust or unreasonable" prohibition of § 201 and damaged Plaintiff pursuant to § § 206-207 of the Communications Act.

The district court dismissed Petitioner's third amended complaint with prejudice pursuant to Respondents' Motion to Dismiss, finding that there was no federal subject matter jurisdiction and that no private right of action existed for violations of Rule 20.11. Pet. App. 30a. The court specifically found that provisions of § § 206-207 do not provide an independent basis for a private right of action unless some other statute has been violated, and that § 201(b) does not provide an independent basis for a private right of action "on the premise regulatory violations necessarily give rise to claims thereunder." Pet. App. 43a. The district court further held that only in "narrow circumstances . . . will the violation of an FCC regulation support a private right of action for damages thereunder, such as when the FCC has expressly determined in its implementing order a particular rules violation constitutes a Section 201(b) violation enforceable through a private court action." Pet. App. 43a.

The Ninth Circuit unanimously affirmed the district court's judgment and endorsed its reasoning. Pet. App. 1a. However, rather than dismissing the Petitioner's suit with prejudice as the district court had, the Ninth Circuit remanded for the complaint to be dismissed *without* prejudice, given that the FCC has primary jurisdiction over these issues and is still considering the issues. In so ruling, the Ninth Circuit held that: "Given the Commission's consideration of [Peti tioner's] compensation claims in *MetroPCS* and the absence of a Commission determination regarding whether the CMRS providers' failure to compensate [Petitioner] violates § 201(b), we conclude that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." Pet. App. 28a. (citation omitted).

REASONS FOR DENYING THE WRIT

Petitioner does not allege any circuit conflict in this case and only seeks certiorari on two issues, neither of which satisfies any of this Court's certiorari criteria.

First, the Ninth Circuit properly rejected Petitioner's request to create an implied cause of action in federal court for violations of Rule 20.11. As the Ninth Circuit stated, "[i]n contrast to the [express cause of action this Court allowed] in *Global Crossing*, the [FCC] has not made any findings that CMRS providers' failure to compensate CLECs constitutes an unreasonable practice in violation of § 201(b)." Pet. App. 23a. This straightforward application of *Global Crossing* is correct and does not conflict with any decision from any other court of

appeals. Nor does the Ninth Circuit's decision even have significant import, for the court expressly noted that the Petitioner could seek administrative relief for its alleged damages. Finally, even if the issue of whether a private right of action exists for violations of Rule 20.11 were worthy of certiorari, this would be a poor vehicle for addressing it because, as explained below, Respondents' actions did not even violate the Rule.

Second, Petitioner's takings claim was neither pressed nor passed on below. That alone makes certiorari inappropriate. Even setting that aside, no court has ever accepted the claim and it is not ripe in any event.

I. THE NINTH CIRCUIT PROPERLY REJECTED PETITIONER'S REQUEST TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION IN FEDERAL COURT FOR VIOLATIONS OF RULE 20.11

The Communications Act provides that a party may bring an action in federal court for "recovery of the damages for which such common carrier may be liable under the provisions of this Act." 47 U.S.C. § 207 (emphasis added). A common carrier (or a telephone company) is "liable" for "damages" related to the telephone company's doing "any act, matter, or thing in *this Act* prohibited or declared to be unlawful." 47 U.S.C. § 206 (emphasis added). Thus, in order to bring a claim in federal court, the complainant must allege a violation of the Communications Act.

Petitioner alleges that Respondents have violated FCC Rule 20.11, which it argues, in turn violates the prohibition against "unjust or unreasonable" practices in § 201(b) of the Communications Act ("all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful"). 47 U.S.C. § 201(b).

As this Court has held, an FCC rule by itself does not create a private cause of action. *Global Crossing*, 550 U.S. at 56 ("Nor do we suggest that every violation of FCC regulations is an unjust and unreasonable practice."). Rather, only those regulations that the FCC properly determines implement § 201(b) give rise to private causes of action. *Global Crossing*, 550 U.S. at 55. The Ninth Circuit correctly concluded that FCC Rule 20.11 is not such a rule.

A. Petitioner Misrepresents the Scope of *Global Crossing*

Petitioner selectively quotes from the *Global Crossing* opinion as finding that a § 201(b) claim exists "[if] the FCC *could* properly find that a [carrier's] failure to pay compensation [pursuant to an FCC rule] is an 'unjust or unreasonable' practice [deemed unlawful] under § 201(b)." Pet. at 11. Petitioner misrepresents the focus of the Court's inquiry, which was on whether an *actual* FCC finding itself was proper to establish a private right of action.

In *Global Crossing*, a payphone operator filed suit alleging a § 201 claim against a long-distance carrier based on the carrier's refusal to pay the payphone operator and contending that the refusal was "unreasonable" and violated the Communications Act. In that case, the FCC issued a series of payphone rules pursuant to a specific statutory provision (Section 276 of the Communications Act), which required, among other things, that a carrier that completes a call from a switch owned by the carrier shall "compensate the payphone service provider for that call at a rate agreed upon by the parties by contract," and "[i]n the absence of an agreement . . . the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494" per minute." 47 C.F.R. § § 64.1300(b), (d). The FCC also expressly found that "failure to pay in accordance with the Commission's payphone rules" constitutes "an unjust and unreasonable practice in violation of section 201(b) of the Act." *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order 18 F.C.C.R. 19975, 19990 at ¶ 32 (2003) (footnote omitted). This Court determined that, in light of the FCC's authority to interpret the Communications Act and because the FCC payphone rules were issued to implement an "explicit statutory scheme," it was well within the FCC's authority to determine that failure to comply with the payphone rules was "unreasonable" under § 201. *Global Crossing*, 550 U.S. at 58.

The facts here are very different from *Global Crossing*. First, unlike in *Global Crossing*, there is

no "explicit statutory scheme" here; to the contrary, while Congress imposed a reciprocal compensation obligation on LECs like Petitioner, it deliberately imposed no such obligation on CMRS providers. *See* 47 U.S.C. § 251(b)(5).

Second, unlike in *Global Crossing*, the FCC has never determined that a wireless carrier's failure to pay reciprocal compensation to a LEC in the absence of an agreement contravenes § 201(b) of the Act; indeed, it has never even declared that the alleged conduct violates the rule at issue, Rule 20.11.

Third, unlike in *Global Crossing*, the FCC did not prescribe a specific rate for call termination by competitive LECs like Petitioner; to the contrary,[4] Congress has explicitly recognized that a bill-and-keep arrangement of the kind that Petitioner and Respondents have been using is one means for LECs to satisfy their statutory reciprocal compensation duty. *See* 47 U.S.C. § 252(d)(2)(B)(i).

Moreover, the dismissal of Petitioner's federal court complaint does not leave Petitioner without a

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[4] The FCC, in implementing § 251(b)(5), has held that a LEC like Petitioner may recover in intercarrier compensation only its traffic sensitive end office switching costs incurred in terminating the originating carrier's traffic. *See First Local Competition Order*, at 16025 ¶ 1057 (1996). As courts have held, "if no additional costs are incurred, there is nothing to pay. The district court's reading of § 251(b)(5) would force carriers to pay one another regardless of whether they incurred additional costs or not. Such a reading would directly contradict the plain meaning of § 252(d)(2)(A)(ii)." *Ace Telephone* v. *Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2006). As stated, *supra*, n.1, Respondents dispute whether Petitioner incurs costs in "terminating" this traffic.

remedy. The Ninth Circuit specifically observed that Petitioner could pursue its claims at the FCC – as the Petitioner already has done with regard to MetroPCS.

In the end, Petitioner wrongly attempts to broaden *Global Crossing*'s holding to permit private enforcement of FCC regulations if the FCC "could" find that the alleged activity violates the Act. The *Global Crossing* opinion does not establish such a broad standard for finding private rights of action to enforce FCC regulations.

B. The Ninth Circuit Opinion is Consistent with *Global Crossing* and Does Not Conflict with Other Circuits

Petitioner also misrepresents the Ninth Circuit opinion below as interpreting *Global Crossing* too narrowly to require that the FCC conclude that "a *specific* CMRS provider's failure to pay a *specific* LEC for its termination of calls violates § 201(b) to support a private right of action under § 207." Pet. at 8. (emphasis added). The Ninth Circuit never required such a *specific* finding; it only concluded that, in the absence of clear intent that § 201(b) prohibits the practice Petitioner complains of, the court should look to whether the FCC had determined that the alleged activity violates the Communications Act.

As explained, the Ninth Circuit's review of whether the FCC had interpreted the Communications Act to prohibit the alleged activity is consistent with *Global Crossing*. Section 201(b) on

its face does not prohibit the failure to pay compensation in the absence of an agreement between carriers; to the contrary, the Act explicitly permits the use of a bill-and-keep arrangement of the sort that Petitioner and Respondents have been using. *See* 47 U.S.C. § 252(d)(2)(B)(i). In the absence of clear Congressional intent, courts have been reluctant to imply private rights of action. *See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052-53 (9th Cir. 2003) ("to imply a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy"); *Conboy v. AT&T Corp.*, 241 F.3d 242, 252-253 (2d Cir. 2001) ("it is highly unlikely, therefore, that Congress intended to create a private right of action for violations of FCC regulations.") In *Global Crossing*, it was only because the FCC had reasonably interpreted the Communications Act to prohibit the conduct at issue that this Court found a private right of action to enforce the regulation.

The Ninth Circuit properly declined to "fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b)." Pet. App. 20a. Specifically, the Ninth Circuit concluded that there was no basis to find a private right of action here, because, "[i]n contrast to the facts in *Global Crossing*, the [FCC] has not made any findings that CMRS providers' failure to compensate CLECs constitutes an unreasonable practice in violation of § 201(b)." Pet. App. 23a.

C. The Petitioner Wrongly Asserts That the FCC Has Made the Necessary Finding to Support a Private Right of Action for its Claims.

At the same time that it argues that *Global Crossing*'s scope allows implied findings by the FCC that the alleged activity violates § 201(b), Petitioner also claims that the FCC has indeed made the express finding necessary to establish a private right of action. To support this contention, Petitioner selects isolated statements out of context from FCC orders. The Ninth Circuit properly rejected these arguments. Read in context, the statements that Petitioner cites do not: (i) interpret § 201(b) to prohibit the activity complained of, or (ii) even determine that the alleged activity violates the applicable FCC rule (section 20.11). To the contrary, these issues have come before the FCC in a complaint case filed by the Petitioner with similar facts, and the FCC has declined to make the very findings on which Petitioner's claims are premised.

In support of its assertion that an actual FCC determination has been made, Petitioner first points to the FCC's statement in the *NCC v. MetroPCS* case that another wireless carrier's failure to pay Petitioner for terminating calls "could constitute a violation of § 201(b) of the Act." Pet. at 15. However, as the Ninth Circuit correctly ruled, the FCC did *not* make the determination that Petitioner seeks. Quoting from the FCC's order in *NCC v. MetroPCS*, the Ninth Circuit observed that "in *MetroPCS*, the [FCC] merely '[f]or purposes of [that]

Order only, . . . assumed, *without deciding*, that a CMRS carrier's failure to enter in good faith into an agreement with a CLEC regarding the termination of intrastate traffic, and a failure to pay a CLEC for such termination, could constitute a violation of section 201(b) of the Act.'" Pet. App. 19a and 20a, n.8 (emphasis added), *citing MetroPCS Bureau Order*, at 3817 n.72; *see also MetroPCS Order*, at 14039 ¶ 9 n.35. The Ninth Circuit concluded that the FCC "simply did not make the determination that [Petitioner] seeks." Pet. App. 19a-20a n.8.

Petitioner also asserts that the FCC has made an "actual determination" that it is owed compensation pursuant to Rule 20.11 in the *T-Mobile Declaratory Ruling*. Pet. at 15. More specifically, Petitioner alleges that the FCC found in the *T-Mobile Declaratory Ruling* that "for the period prior to April 29, 2005, tariffs were lawful and valid." Pet. at 15. (citation omitted). The Petitioner further argues that, because of that determination, the Respondents' failure to pay termination violates FCC Rule 20.11 and is an unreasonable practice under § 201. There are several deficiencies in Petitioner's arguments.

First, the FCC did not find in the *T-Mobile Declaratory Ruling* that a failure to pay tariffed termination charges violates its rules or the Act. The FCC did not deem those tariffs filed before April 29, 2005 lawful; it only declined to find them *unlawful*. The FCC expressly noted that, while "a tariffed arrangement would not be unlawful *per se* under current rules [as of April 29, 2005], we make no findings regarding *specific obligations* of any

customer of any carrier to *pay any tariffed charges*." *T-Mobile Declaratory Ruling*, at 4861 n.40. (emphasis added).

Second, the tariffs that the FCC declined to find unlawful were tariffs filed by *incumbent* local exchange carriers – and not those filed by competitive local exchange carriers, like Petitioner. *Id.* at 4863, ¶ 13 ("For all of these reasons, we cannot conclude that a tariff filed by an incumbent LEC imposing termination charges on wireless traffic would be unlawful").[5]

Third, the FCC only found that ILEC tariffs *filed before April 29, 2005* were not unlawful. The FCC ruled that, as of April 29, 2005, no state LEC tariff for termination charges may be unilaterally imposed on a wireless carrier; and that under its amended Rule 20.11, "in the absence of a request for an interconnection agreement, no compensation is owed for termination." *Id.* at 4864 n. 57.

Thus, the FCC has not made the necessary nexus between a Rule 20.11 violation and § 201(b) of the Act. In fact, as discussed above, the FCC has

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[5] Incumbent local exchange carriers have different rights and obligations with respect to interconnection and traffic compensation *vis a vis* CMRS providers than CLECs. *See, e.g.*, Rule 20.11(e) (an "incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act."). Section 252 of the Act requires ILECs to negotiate and arbitrate interconnection and reciprocal compensation agreements at a state commission; however, it does not empower state commissions to arbitrate interconnection agreement disputes between two competitive carriers (*e.g.*, a competitive LEC and CMRS provider).

recently declined to make the most fundamental finding on which Petitioner bases its claim – that a wireless carrier's failure to pay termination charges to Petitioner (in the absence of a negotiated agreement) even violates its Rule 20.11 in a suit brought by Petitioner against another CMRS provider. Given the FCC's failure to find even a violation of Rule 20.11 on the nearly the *same facts* as underlie Petitioner's claims here, it is particularly appropriate that the Ninth Circuit refused to imply a private right of action for compensation under § 201(b) and to remand for dismissal of the declaratory judgment claim (premised on § 201(b)) without prejudice "to allow filing of the claim in the proper forum." Pet. App. 28a.

II. THE CASE DOES NOT PRESENT AN ISSUE OF SIGNIFICANT IMPORT.

Petitioner next argues that the Petition presents an issue of "great practical importance." Pet. at 17. Asserting that "it would be antithetical to the pro-competition goals underlying the 1996 Communications Act to allow Respondents . . . to continue free-riding on CLECs such as [Petitioner]," (Pet. at 18), Petitioner argues that "[r]equiring [it] and other CLECs to return to the FCC for a second administrative determination . . . would do nothing." Pet. at 19. Petitioner overstates the importance of these issues and the alleged burden imposed by the Ninth Circuit's holding that Petitioner should seek relief first at the FCC.

As an initial matter, the Petitioner's claim rests on a faulty premise that Respondents' actions constitute "free-riding" on its network. Pet. at 19.

As discussed, the FCC has not determined that a CMRS provider necessarily has an obligation to pay termination to a carrier in the absence of a negotiated agreement. *MetroPCS Bureau Order* at 3814, ¶ 15, n.55; *MetroPCS Order*, at 14038, ¶ 8. To the contrary, the FCC has tentatively concluded that bill and keep (*i.e.*, exchange of traffic without payment) is particularly appropriate in cases where, such as here, traffic flows almost entirely in one direction. *See Developing a Unified InterCarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9616-9618, 9629 at ¶¶ 11-18, 52 (2001) ("Intercarrier Compensation NPRM"); *see also* 47 U.S.C. § 252(d)(2)(B)(i); Federal Communications Commission, *Connecting America: FCC National Broadband Plan* (rel. Mar. 16, 2010) ("National Broadband Plan"), Recommendation 8.7 at 148 (proposing to eliminate all payments for intercarrier compensation in favor of bill-and-keep).[6]

Moreover, the traffic compensation issues that are raised by this Petition are but a subset of a fairly complex set of issues surrounding intercarrier compensation that are currently pending before the FCC. In addition to the *MetroPCS* case, which has held in abeyance the issue underlying this case (*i.e.*, whether failure to pay terminating compensation to Petitioner in the absence of an agreement violates FCC Rule 20.11), the FCC has at least three pending proceedings in which it is addressing some or many aspects of the issues raised here. *See InterCarrier Compensation NPRM* (CC Docket No. 01-92); *T-Mobile Declaratory Ruling*, Petitions for Rehearing

[6] Available at: http://download.broadband.gov/plan/national-broadband-plan.pdf

(CC Docket No. 01-92); *Establishing Just and Reasonable Rates for Local Exchange Carriers* (WC Docket No. 07-135). Earlier this year, the FCC also affirmed its commitment to addressing traffic compensation issues, and emphasized that it would resolve some of the issues (including arbitrage of the compensation rules by carriers that engage in traffic "stimulation") by the end of this year. *FCC National Broadband Plan,* Recommendation 8.7 at 148. Accordingly, the FCC is and will be addressing the underlying issues in the near future and there is no pressing need for the Court to address the issues asserted in the Petition at this time.

Petitioner also exaggerates the burden that would be imposed on it by having to return to the FCC to obtain the preliminary liability finding. As an initial matter, Petitioner already has sought resolution at the FCC of similar issues in the *NCC v. MetroPCS* case; thus, its claim that this is unduly burdensome is disingenuous. Furthermore, Petitioner only sought a declaratory judgment from the court below that it is owed compensation pursuant to Rule 20.11 and § 201(b). Even if Petitioner obtained the declaratory judgment that it sought, it would still need to obtain an administrative finding as to the "reasonable" rate for termination. *See MetroPCS Order* at ¶ 20. As Petitioner acknowledges in its own Complaint, the rate at which it would be compensated would "be determined by the appropriate regulatory body." Third Amended Complaint at ¶ 30, *North County Communications Corp. v. A+ Wireless, Inc., dba Advantage Wireless-CA (OCN 822A) et al.*, Case No. 06-CV-1542 (filed Mar. 21, 2007). By Petitioner's

own admission, therefore, it would still need to return to an administrative agency to obtain a ruling as to the appropriate rate for compensation even if it were able to enforce its claim in court.

III. PETITIONER'S TAKING QUESTION WAS NOT RAISED OR DECIDED BELOW AND IS NOT RIPE FOR REVIEW

Petitioner asserts that the Court should grant certiorari because a physical taking has occurred by virtue of the Ninth Circuit's opinion, for which just compensation is owed. Pet. at 20. The Ninth Circuit's opinion, however, does not compel Petitioner, nor any other carrier, to "unwillingly accept traffic from another carrier," nor does it force the Petitioner to bear any public burden. Consequently, there has been no Fifth Amendment taking.

In any event, the issue was neither raised nor decided below, which Petitioner concedes. *See* Pet.. at 21. "'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (per curiam) (quoting *Duignan v. United States*, 274 U. S. 195, 200 (1927)). While Petitioner would like this Court to believe this is such an exceptional case, it is not. In fact, the question is not even ripe for review.

This Court has consistently held that a takings claim challenging the application of an agency's regulations is not ripe for review unless "the government entity charged with implementing the regulations has reached a final decision regarding

the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). The Court in *Williamson* stated that to meet the ripeness requirement, a two-prong test must be met, showing that: (1) the regulatory entity has rendered a "final decision" on the matter, and (2) the plaintiff has sought just compensation by means of an available governmental procedure. *Id.* at 186, 194-95. Petitioner has not met either of these prongs.

The FCC has not rendered a final decision, with regard to the Respondents or any other CMRS carrier, as to whether Petitioner is entitled to compensation when there is no agreement between the parties. The *T-Mobile Declaratory Ruling* raised the question of what arrangements are necessary to trigger compensation obligations under the FCC's rules. Although that decision prohibited the application of tariffs to impose compensation obligations for "local" traffic after April 29, 2005, no subsequent decision by the FCC has answered the question as to whether compensation is owed absent an agreement between the parties. Furthermore, as to the Respondents, and in accordance with the Ninth Circuit opinion instructions, the Petitioner must obtain from the FCC a decision regarding whether any compensation is owed by the Respondents, before it can pursue its takings claim. Because there has been no final decision by the FCC, it is premature to discuss whether Petitioner has sought just compensation by means of an available governmental procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

NORTH COUNTY COMMUNICATIONS CORP.,
Petitioner,

v.

CELLCO PARTNERSHIP,
D/B/A VERIZON WIRELESS-CA (OCN 6006), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included within the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents' repeated description of the parties' relationship as a "bill-and-keep arrangement," BIO 13, 15, proves the petition's point. There *is* no "bill-and-keep arrangement" – or any reciprocal compensation regime – between the parties, which is precisely why the Ninth Circuit's misapplication of *Global Crossing Telecomm., Inc. v. Metrophones Telecomm. Inc.*, 550 U.S. 45 (2007) deserves the Court's attention. Respondents' repeated reliance on a default "bill and keep" relationship is contrary to both the facts and the law.

The statutory provision to which Respondents point, 47 U.S.C. § 252(d)(2)(B)(i), provides that nothing in § 252(d)(2), governing "pricing standards" for purposes of an ILEC's compliance with § 251(b)(5), shall be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)....". But while that evinces Congress's intent to recognize bill-and-keep arrangements as a permissible means of satisfying a party's reciprocal-compensation duty, Respondents err in asserting that they and North County "have been using" such an arrangement. BIO 13, 15.

"Bill and keep" is "an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other

network...." *Pac-Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1122 n.7 (9th Cir. 2003), *citing In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, 9204 n.6 (2001). As a compensation method, it is an alternative to the reciprocal compensation agreements provided for in 47 U.S.C. § 251(b)(5). But the FCC's definition encompasses two critical points.

First, a "bill and keep" arrangement assumes a symmetric exchange of traffic between the parties, each sending approximately the same amount of traffic it receives from the other. Second, and even more important, to fulfill its obligation of reciprocal compensation, each "bill and keep" participant agrees to the arrangement – it is not a default schema to be forced unilaterally upon CLECs by CMRS providers. As the parties agree, traffic here is for the most part a one-way street: CLECs such as North County terminate calls from CMRS providers' customers, but send few, if any, the other way. This near-complete assymetry of traffic allows the CMRS providers effectively to free-ride on the CLECs' networks, and is why this Court's intervention is essential. To these established wireless behemoths, "bill and keep" means they leave upstart CLECs holding the bill for this one-sided arrangement, and the latter keep paying it – all under the auspices of Federal law. And such abuse will continue, contrary to *Global Crossing* and the Act, unless this Court intervenes.

Respondents further err in seeking refuge behind various inchoate FCC proposals for the potential replacement of intercarrier compensation with "bill

and keep." BIO 20, *citing, inter alia, Developing a Unified InterCarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9616-9618, 9629 at ¶¶ 11-18, 52 (2001) ("Intercarrier Compensation NPRM") and Federal Communications Commission, *Connecting America: FCC National Broadband Plan*, (rel. March 16, 2010) ("National Broadband Plan"), Recommendation 8.7 at 148. Neither the NPRM nor the National Broadband Plan is an order, *see American Council on Educ. v. FCC*, 451 F.3d 226, 235-236 (D.C. Cir. 2006) (rejecting reliance on proposed FCC rule since "a *proposed* rule is not a *final* rule") (emphasis in original). Thus, neither can legitimize Respondents' continued subjection of North County and other CLEC's to what is essentially indentured servitude.

Finally, while Respondents concede that a regulation that implements § 201(b) gives rise to a private cause of action under *Global Crossing*, they make the puzzling assertion, without citation, that "[t]he Ninth Circuit correctly concluded that [47 C.F.R. 20.11(b)] is not such a rule." BIO 11. To the contrary, the rule indeed implements § 201(b). *See* Pet. 4-5.

Respondents' mischaracterization of the parties' relationship as "bill and keep," and their misplaced assertion that they may unilaterally force such an arrangement upon unwilling CLECs, underscores why their refusal to pay or negotiate a reciprocal compensation arrangement is "unjust or unreasonable" under 47 U.S.C. § 201(b), and gives rise to a private cause of action under § 207. *Global Crossing*'s continued vitality requires rejection of Respondents' position.

CONCLUSION

The petition for a writ of certiorari should be granted.

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